Supreme Court, U.S.
FILED

No. 95-295 AUG 17 1995

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In The
SUPREME COURT OF THE UNITED STATES
October Term, 1995

COMANCHE INDIAN TRIBE OF OKLAHOMA,

Petitioner,

v.

THE HONORABLE RICHARD E. HOVIS, THE DISTRICT COURT OF KIOWA COUNTY, OKLAHOMA, AND RHONDA WAHNEE,

Respondents.

Petition For A Writ Of Certiorari To The United States Court of Appeals For the Tenth Circuit

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106 pp

QUESTIONS PRESENTED

1. Whether § 1914 of the Indian Child Welfare Act, 25 U.S.C. § 1901 *et seq.*, (the "ICWA") which authorizes an Indian tribe to "petition any court of competent jurisdiction to invalidate" a decision of a state court that violates the substantive requirements of the ICWA, operates as a statutory exception to the usual "full faith and credit" that federal courts accord state court judgments under 28 U.S.C. § 1738?

2. Whether the court of appeals violated this Court's clear teachings and the well-established "American Rule" by awarding attorneys' fees against the Comanche Indian Tribe based either on the ICWA (which does not authorize the award of attorneys fees) or on state law grounds that were never adjudicated by the court of appeals and upon which the respondent did not prevail?

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Respondents.

PETITION FOR A WRIT OF CERTIORARI

OPINIONS BELOW

The opinion of the court of appeals is reported at 53 F.3d 298 (10th Cir. 1995) and is reprinted at Appendix A. The order of the court of appeals denying the Comanche Indian Tribe's petition for rehearing is reprinted at Appendix B. The court of appeals' order granting respondent Rhonda Wahnee's application for attorneys fees is reprinted at Appendix C. The opinion of the district court is reported at 847 F. Supp. 871 (W.D. Ok. 1994) and is reprinted at Appendix D.

JURISDICTION

The judgment of the court of appeals was entered on April 18, 1995. A timely petition for rehearing was filed by the Comanche Indian Tribe. The court entered its order denying that petition on May 19, 1995. The court of appeals entered its further order granting respondent Wahnee's application for attorneys fees on July 20, 1995. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

Jurisdiction in the district court was based upon 28 U.S.C. §§ 1331 (federal question) and 1362 (federal question raised by Indian tribe), in that the case arose under the Indian Child Welfare Act.

STATUTES INVOLVED

Several sections of the Indian Child Welfare Act, 25 U.S.C. § 1901 *et seq.* (the "ICWA" or the "Act") are relevant to this proceeding. Section 1914 provides as follows:

> § 1914. Petition to court of competent jurisdiction to invalidate action upon showing of certain violations.
>
> Any Indian child who is the subject of any action for foster care placement or termination of parental rights under State law, any parent or Indian custodian from whose custody such child was removed, and the Indian child's tribe may petition any court of competent jurisdiction to invalidate such action upon a showing that such action

> violated any provision of sections 1911, 1912, and 1913 of this title.

Sections 1911, 1912 and 1913 are the substantive provisions of the ICWA. Of these, only § 1911 is relevant here, as the Comanche Tribe filed his action in federal court alleging that the Kiowa County District Court and Judge Hovis had violated the provisions of § 1911(a) by finding that the state court had jurisdiction over the Wahnee child custody matter. Section 1911 is reprinted in its entirety at Appendix E. Section 1911(d), which is particularly relevant to this case, provides as follows:

> (d) Full faith and credit to public acts, records, and judicial proceedings of Indian tribes.
>
> The United States, every State, every territory or possession of the United States, and every Indian tribe shall give full faith and credit to the public acts, records, and judicial proceedings of any Indian tribe applicable to Indian child custody proceedings to the same extent that such entities give full faith and credit to the public acts, records, and judicial proceedings of any other entity.

The statute relied upon by the court of appeals to find that the Comanche Tribe was collaterally estopped from bringing this cause of action was 28 U.S.C. § 1738. That statute provides, in pertinent part:

> [t]he records and judicial proceedings of any court of any . . . State. . . shall have the

> same full faith and credit in every court within the United States . . . as they have by law or usage within the courts of such state . . . from which they are taken.

STATEMENT OF THE CASE

I. STATEMENT OF FACTS[1]

Kristy Wahnee, an enrolled member of the Comanche Indian Tribe of Oklahoma, is the daughter of respondent Rhonda Wahnee, a non-Indian, and Stuart Wahnee, a Comanche tribal member. The Comanche Tribe is a federally recognized tribal government. In October, 1985, Rhonda filed for divorce from Stuart. In January, 1986, both Rhonda and Stuart signed a power of attorney giving custody of Kristy to Blanche Wahnee, Stuart's sister and also an enrolled tribal member. In May, 1986, the District Attorney for Kiowa County, Oklahoma, filed petitions in state court on behalf of Kristy and her brother (who subsequently died) to terminate Rhonda's parental rights, based on alleged abuse and neglect.

At a state court hearing in May, 1987, the state court noted that the Comanche Tribal Children's Court sought to assume jurisdiction over the proceeding involving Kristy. Despite Rhonda's objection, the state court transferred the case to tribal court in June, 1987, and the tribal court accepted jurisdiction over the proceeding. At a number of hearings conducted between September,

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[1]These facts are summarized from the district court opinion, 847 F. Supp. at 873-76, Appendix D at D-4 to D-9, and the court of appeals opinion, 53 F. 3d at 299-300, Appendix A at A-2 to A-6.

1987, and August, 1990, the tribal court determined that it had jurisdiction over the matter under the ICWA. During that three year period, the tribal court exercised exclusive jurisdiction over the child custody proceeding.

In February, 1991, Rhonda petitioned the state court to vacate its June, 1987, order transferring the proceeding to tribal court. The state court granted that motion, vacating its earlier transfer order. In response to that action, in February and March, 1991, the Comanche Tribe filed two motions in state court, asking the state court to rescind its order vacating the transfer or alternatively, to transfer the matter back to the tribal court under 25 U.S.C. § 1911(a), in that the tribal court had already determined that it had jurisdiction over the proceeding. Rhonda also filed a motion for summary judgment in the state court in March, 1991, to which the Comanche Tribe responded. In June, 1991, the state court denied the Tribe's motions and granted Rhonda's motion, finding that the state court had jurisdiction under § 1911(b).

The Tribe then filed a motion to intervene in the ongoing tribal court proceeding. Upon intervening, the Tribe filed a motion for summary judgment, asking the tribal court to again examine its jurisdiction. The tribal court did so and, in February, 1992, issued a decision once again concluding that it had exclusive jurisdiction over the proceeding involving Kristy under § 1911(a) of the ICWA.

II. PROCEEDINGS BELOW

The Comanche Tribe filed this action in federal district court in October, 1992, against the state court and the state court judge. The Tribe's complaint sought a declaratory judgment that the tribal court had exclusive jurisdiction over the custody proceeding involving Kristy

or, alternatively, that the court should transfer the case to Kansas, where Kristy resided during the school year with her custodial aunt, Blanche. Rhonda intervened and the defendants and intervenor moved to dismiss. The district court granted that motion with respect to the alternative claim to transfer the case to Kansas, but denied the motion with respect to the underlying jurisdictional dispute. On cross-motions for summary judgment, the district court held for the Tribe, finding that the tribal court had exclusive jurisdiction under § 1911(a).

On appeal, the Tenth Circuit reversed, holding that the Tribe was bound by the state court's 1991 determination of its own jurisdiction. Appendix A. The court held that under 28 U.S.C. § 1738, the Tribe was collaterally estopped from litigating in federal court the jurisdictional issue that the state court had decided. Finally, the court of appeals held that § 1914 of the ICWA could not be construed to be a statutory exception to the usual full faith and credit requirement of § 1738. After denying the Tribe's petition for rehearing, Appendix B, the panel, with one judge dissenting, granted the intervenor's application for attorneys fees in an order that offered no explanation or reasoning for its action. Appendix C.

This petition followed.

REASONS FOR GRANTING THE WRIT

THE COURT OF APPEALS HAS SERIOUSLY UNDERMINED CONGRESSIONALLY-MANDATED TRIBAL RIGHTS BY ITS INTERPRETATION AND APPLICATION OF THE INDIAN CHILD WELFARE ACT.

Through its enactment of the Indian Child Welfare

Act in 1978, Congress intended to address and correct years of abuse and state-court hostility in connection with custody proceedings involving Indian children. Under the ICWA, Indian children, Indian parents and Indian tribes have been provided with substantive rights and procedural benefits designed to strengthen and protect Indian involvement in such child custody proceedings. This Court clearly recognized these facts, and strengthened these protections, with its decision in *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30 (1989). In that case, the Court rejected a state law definition of the term "domicile" as being inconsistent with congressional intent and instead adopted a definition that assured tribal court jurisdiction over the child custody proceeding. In so doing, the Court recognized that the "prerogatives accorded the tribes" under the ICWA (including § 1914) must "be seen as protecting not only the interests of individual Indian children and families, but also of the tribes themselves." 490 U.S. at 49.

The Tenth Circuit's decision in this case seriously and impermissibly undermines those congressionally-mandated protections. By misinterpreting § 1914 of the Act, the court of appeals has deprived the Comanche Tribe of its ability to have a federal court "invalidate" an erroneous state court decision on tribal court jurisdiction. In addition, without any justification or explanation, the court awarded attorneys' fees against the Comanche Tribe under circumstances that plainly do not justify such an award.

I. THE COURT OF APPEALS HAS SERIOUSLY MISCONSTRUED § 1914 BY IGNORING ITS PLAIN LANGUAGE AND THE TEACHING OF *MISSISSIPPI CHOCTAW v. HOLYFIELD*

Section 1914 of the ICWA authorizes an Indian tribe to "petition any court of competent jurisdiction to invalidate [a state court child custody decision] upon a showing that such action violated any provision of sections 1911, 1912 and 1913 of [the ICWA]." The panel decision, in reliance on its earlier decision in *Kiowa Tribe v. Lewis*, 777 F.2d 587 (10th Cir. 1985) *cert. denied* 479 U.S. 872 (1986), held that "it is clear that § 1914 is not an independent ground to relitigate state court decisions." 53 F.3d at 304; Appendix at A-16. That conclusion, however, ignores the plain statutory language and judicial interpretation of the Act as provided by the Supreme Court in *Mississippi Choctaw v. Holyfield*, 490 U.S. 30 (1989).

In *Kremer v. Chemical Construction Corporation*, 456 U.S. 470 (1982), the case relied upon by the Tenth Circuit in *Kiowa Tribe*, the Supreme Court stated that ordinarily 28 U.S.C. § 1738 requires that federal courts give the same preclusive effect to state court judgments that those judgments would receive in the issuing state's courts. Statutory exceptions to this full faith and credit requirement must be clearly manifested by Congress in the language or legislative history of the statute, which must reveal an "express or implied" intent to depart from the normal rules of finality. *Kremer*, 456 U.S. at 468. Under this test, the Court in *Kremer* held that a federal statute authorizing an individual aggrieved by alleged discrimination to bring "a civil action" in federal court did not clearly override the requirement of § 1738, and

therefore did not authorize relitigation in federal court of a discrimination claim fully adjudicated in state court. The Court in *Kremer* also noted that two years earlier, using the same standard, it had decided that 42 U.S.C. § 1983, authorizing civil actions for deprivations of civil rights, did not create an exception to the finality requirement of § 1738. *Allen v. McCurry*, 449 U.S. 90 (1980).

The language of 25 U.S.C. § 1914 is considerably more specific than the statutory language considered in *Kremer* and *McCurry*, however, and plainly evidences congressional intent that tribes would have the right to relitigate in another forum allegedly erroneous state court decisions rendered under the ICWA. Indeed, the language of the statute--that tribes "may petition any court of competent jurisdiction to invalidate" a state court action--can hardly be read any other way.

In *Kiowa Tribe*, the court found that this language did not authorize federal court review, but "seems rather to state simply where such actions may initially be brought." 777 F.2d at 592. Yet this reading ignores the key phrase, "any court of competent jurisdiction." If the *Kiowa Tribe* analysis were correct, § 1914 would state that the tribe may petition "the state court that issued the order" to seek invalidation of it. However, that is not what § 1914 authorizes; it allows the tribe to petition "any court of competent jurisdiction;" a phrase that plainly encompasses a federal court. *See Roman-Nose v. New Mexico Department of Human Services*, 967 F.2d 435, 437 (10th Cir. 1992) (district court has jurisdiction over § 1914 claim). Moreover, the court of appeals' analysis also ignores the existence of § 1911(c), which permits the tribe to intervene in a state court proceeding "at any point in the proceeding." Under the *Kiowa Tribe* analysis, § 1914 would simply be duplicative of § 1911(c), a result that Congress could not have intended.

Equally as important, the Tenth Circuit's analysis ignores the plain meaning of the most critical word in § 1914: "invalidate." The dictionary definition of that word is to "deprive of legal efficacy." The New Shorter Oxford English Dictionary 1408 (1993). By using this word in the context of § 1914, it is clear that Congress intended that another court (i.e., a federal court or a tribal court) would have the authority to review an allegedly erroneous state court ICWA decision and, if necessary, to set aside that state court action. Giving the phrase its plain and ordinary meaning then, § 1914 must be viewed as an exception to the usual collateral estoppel principles embodied in 28 U.S.C. § 1738.

The validity of the Tenth Circuit's reasoning in *Kiowa Tribe* and in this case is also called into question by the Supreme Court's in-depth analysis of the ICWA in *Mississippi Choctaw v. Holyfield*, 490 U.S. 30 (1989). In *Kremer*, the Court noted that exceptions to § 1738's finality principle must "demonstrate that Congress intended to override the historic respect that federal courts accord state court judgments." 456 U.S. at 471-72. As discussed in *Holyfield*, it is evident that Congress displayed precisely that intent in enacting the ICWA, including § 1914.

First, the Act itself says just that. Section 1901(5) of the ICWA states unequivocally that the ICWA was needed because the states, in exercising their normal child custody responsibilities, have "failed to recognize" unique tribal social and cultural standards. According to the Court in *Holyfield*, "Congress perceived the States and their courts as partly responsible for the problem it intended to correct." 490 U.S. at 45. In order to remedy this situation, Congress enacted the ICWA specifically "to curtail state authority" in the area of child custody proceedings. *Id.*, n.17. This was necessary, according to Congress, because "state courts and agencies share a large

part of the responsibility" for the crisis threatening Indian families. *Id.*, n.18 (quoting from legislative history of ICWA).

Moreover, the *Holyfield* Court recognized that § 1914 was among the "numerous prerogatives accorded the tribes through the ICWA's substantive provisions." 490 U.S. at 49. At the heart of the ICWA, according to *Holyfield*, was Congress' determination that with respect to Indian children domiciled or residing on the reservation, "tribal jurisdiction was exclusive as to the states" under § 1911(a), *id.* at 42, and that therefore "in certain situations the state courts did *not* have jurisdiction over child custody proceedings." *Id.* at 45 (emphasis in original).

In this context, then, § 1914 can only be read as conferring on the tribe the right to petition a federal court to set aside (i.e., "to invalidate") an erroneous state court determination as to tribal court jurisdiction. To conclude otherwise, as the Tenth Circuit did in this case, would completely undermine the protection of the tribe's interest, which the Supreme Court found "is at the core of the ICWA." *Holyfield*, 490 U.S. at 52 (*quoting In re Adoption of Halloway*, 732 P.2d 962 (Utah 1986).

Stated another way, it is simply unreasonable to contend that by enacting § 1914, Congress intended that tribes would be collaterally estopped from challenging in federal court allegedly erroneous state court ICWA decisions affecting tribal interests in child custody proceedings.[2] Instead, it is far more reasonable to give the language of that section its plain meaning: that tribes

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[2]As this Court correctly recognized in *Holyfield*, the Indian child's tribe "has an interest in the child which is distinct from but on a parity with the interest of the parents." 490 U.S. at 52.

may petition "any court of competent jurisdiction to invalidate" an improper state court ICWA decision, as the Comanche Tribe sought to do in this case.

In holding that the 1991 decision of the Kiowa County District Court asserting state court jurisdiction over the Wahnee child custody proceeding was entitled to "full faith and credit" under U.S.C. § 1738, the court of appeals also ignored the statutory requirement of 25 U.S.C. § 1911(d). That provision requires that state and federal courts accord full faith and credit to tribal court determinations under the ICWA. The record of this case is clear that the Comanche Tribal Children's Court first determined that it had both subject matter and personal jurisdiction of the Wahnee child custody proceeding on November 28, 1988 and reiterated this finding at several hearings in 1989 and 1990. *Comanche Tribe v. Hovis*, 847 F. Supp. at 874; Appendix at D-7.

Under 25 U.S.C. § 1911(d), these tribal court determinations of jurisdiction were entitled to full faith and credit in both state court and in federal court, as the district court correctly found. *Id.* at 884-85, Appendix D at D-33, 34. Yet rather than giving these judicial actions the preclusive effect that Congress intended they be accorded, the panel decision ignored them, holding instead that when the Tribe went into state court three years later to apprise respondent Hovis that the tribal court had already determined that it had exclusive jurisdiction, the Tribe was bound by an adverse state court ruling. Not only was this decision unwarranted, but it also violated the mandate of § 1911(d), that tribal court actions be given full faith and credit in subsequent state and federal court proceedings.

The panel decision is also contrary to the reasoning of *National Farmer's Union Insurance Company v. Crow Tribe*, 471 U.S. 845 (1985) and *Iowa Mutual Insurance*

Company v. LaPlante, 480 U.S. 9 (1987). In those cases, this Court has made clear that a tribal court should have the first opportunity to determine the extent of its jurisdiction to adjudicate civil matters involving tribal interests. That is precisely what the Comanche tribal court did in this case. Yet, the panel decision ignores these teachings and, on the basis of *Kiowa Tribe*, creates an unwarranted trap for the unwary tribe by holding that a tribe that determines that the tribal court has jurisdiction under the ICWA, then goes into state court to assert that jurisdiction, is bound by an adverse state court ruling. It is unlikely that a Supreme Court that was so careful to recognize and protect tribal court jurisdiction in *National Farmer's Union* and *Iowa Mutual* would countenance a result so hostile to tribal court interests.

Finally, the court's narrow interpretation of § 1914 ignored well-established special canons of construction for interpreting statutes passed for the benefits of Indians. As the Supreme Court has noted, "standard principles of statutory construction do not have their usual force in cases involving Indian law." *Montana v. Blackfeet Tribe*, 471 U.S. 759, 766 (1985). Rather, "statutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit." *Id.*; *accord*, *Bryan v. Itasca County*, 426 U.S. 373, 392 (1976); *McClanahan v. Arizona Tax Commission*, 411 U.S. 164, 174 (1973). Plainly, the court of appeals did not apply this canon of construction to § 1914. Instead of reading the section expansively, the court gave it an impermissibly narrow and illogical reading; an interpretation that is inconsistent with the language and intent of the ICWA and with the teachings of this Court in *Holyfield*, *National Farmers Union* and *Iowa Mutual*.

In summary, the court of appeals has undermined important tribal interests by misconstruing § 1914; a

matter that this Court can and should review.

II. THE COURT OF APPEALS IMPROPERLY AWARDED ATTORNEYS' FEES TO RESPONDENT WAHNEE.

A. Introduction

Under the so-called "American Rule," the prevailing party in a lawsuit is not entitled to recover its attorneys' fees except in narrowly defined circumstances. The Supreme Court strongly reaffirmed this concept in *Alyeska Pipeline Service Company v. Wilderness Society*, 421 U.S. 240 (1975). In that case, the Court stated that federal courts are not authorized

> to jettison the traditional rule against non-statutory allowances to the prevailing party and to award attorneys' fees whenever the courts deem the public policy furthered by a particular statute important enough to warrant the award.

420 U. S. at 263. Unfortunately, the Tenth Circuit has ignored the Court's admonition and has done exactly that in this case.

This action was filed and decided under the Indian Child Welfare Act, 25 U.S.C. § 1901 *et. seq.*, a federal statute that makes no provision for the award of attorneys' fees to the prevailing party.[3] In order to circumvent this

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[3]As this Court has noted, "Congress itself presumably has the power and judgment to pick and choose among its statutes and to allow attorneys fees under some but not

policy decision by Congress, the intervenor argued to the Tenth Circuit that she was entitled to an award of attorneys' fees in this case on the basis of "pendent statutory state claims."

There is no authority or justification for this contention. In essence, the intervenor asked the court to award attorneys' fees on the basis of:

(a) brief references in the Tribe's complaint to the definitional provisions of two state statutes (which do not constitute "pendent state claims");

(b) that were included in an alternative claim for relief that was dismissed by the district court (the dismissal of which was not appealed);

(c) that were never cited by or relied upon by the plaintiff or the court of appeals; and

(d) upon which the intervenor did not prevail.

Without explaining the basis for its decision, the Tenth Circuit granted the intervenor's application for attorneys' fees. Appendix at C-2. No federal court has ever before awarded attorneys' fees under circumstances such as these, and, in fact, the cases make clear that it is improper to do so.

B. The Alleged "Pendent State Claims."

The intervenor petitioned the court of appeals to award her attorneys' fees on the basis of Count Two of the

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others." Alyeska Pipeline, 420 U.S. at 263.

Tribe's complaint.[4] Count Two is expressly styled as an alternative claim; it states that if the court does not award exclusive jurisdiction to the Comanche Tribal Children's Court as requested under Count One, then there are facts under which the court could find that it would be appropriate to transfer the proceeding to Douglas County, Kansas, where custodial aunt Blanche Wahnee and Kristy Wahnee reside during the school year. In support of this alternative claim, in paragraph XLI (Appendix at F-11), the complaint included a single reference to the Uniform Child Custody Act, the Parental Kidnapping Protection Act, the Oklahoma Child Custody Jurisdiction Act and the Kansas Child Custody Jurisdiction Act.[5] As that paragraph makes clear, however, those statutes were cited for the sole and limited purpose of calling to the court's attention the uniform definition of "home state" included in all these enactments.

The defendants and intervenor moved to dismiss the complaint in the district court. The district court denied the motion with respect to Count One, but granted the motion in part and dismissed Count Two. As described by the district court,

> The Tribe's complaint in this Court . . . seeks a declaratory judgment as to whether the Tribal Court or the State Court has exclusive jurisdiction to adjudicate matters relating to Kristy. Alternatively, the Tribe

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[4]The complaint (without exhibits) is reprinted at Appendix F.

[5]The Oklahoma and Kansas statutes allow those state courts to award attorneys' fees in child custody matters under certain circumstances.

> seeks a declaratory judgment directing that the case be transferred to the District Court of Douglas County, Kansas.
>
> * * *
>
> Motions to dismiss were filed . . . . *The Court granted the motion to dismiss as to the Tribe's application to transfer*, but denied the motion as to the overall jurisdictional dispute . . . .

Comanche Indian Tribe of Oklahoma v. Hovis, 847 F. Supp. at 875, Appendix at D-9 (emphasis added).

The Comanche Tribe did not appeal the dismissal of Count Two, and the Tribe made no further reference, in the district court or the court of appeals, to any of the statutes referred to in paragraph XLI of the complaint. In short, the Oklahoma Child Custody Jurisdiction Act and the Kansas Child Custody Jurisdiction Act, upon which the intervenor sought an award of attorneys' fees, played no part whatsoever in the adjudication of this case.

C. Count Two Did Not Assert "Pendent State Claims."

It is clear from both the language and the context of paragraph XLI that the Comanche Tribe was not asserting pendent state law claims in this case. Indeed, the very next sentence of that paragraph belies any such argument: "Title 28 U.S.C. § 1738A preempts state law with regard to determining jurisdiction and therefore, this Court has jurisdiction to declare which state court, if not

the tribal court, has jurisdiction." (Appendix at F-11). Whatever the merits of that statement, (and the district court obviously did not find much merit in it since the court promptly dismissed Count Two) it is clear that the Tribe was asserting a federal claim for a declaratory judgment based on federal law. A mere reference to a state law definitional provision in a federal complaint cannot reasonably be construed as asserting pendent state law claims.

D. The Alternative Claim In Count Two Was Dismissed By The District Court And Never Adjudicated On Its Merits.

As discussed above, the defendants and the intervenor moved to dismiss the Comanche Tribe's entire complaint in the district court. After briefing and oral argument, the district court granted this motion in part and dismissed Count Two of the complaint. *Comanche Indian Tribe v. Hovis*, 847 F. Supp. at 875. The Tribe did not appeal that dismissal.

Because of this action, it is undisputed that the district court never adjudicated Count Two on its merits. Nor did that dismissed count play any role whatsoever in the Tenth Circuit's decision reversing the judgment of the district court. In short, Count Two was dismissed by the district court, and even if it can be construed to include "pendent state claims," it is undisputed that the intervenor did not prevail on those claims.

E. The Cases Make Clear That Attorneys' Fees May Not Be Awarded Under These Circumstances.

This Court's decisions make it clear that it was

improper for the court of appeals to award attorneys fees against the Comanche Tribe under the circumstances of this case.

To be sure, there is a line of authority for the principle that if a plaintiff joins a substantial federal claim (which allows for attorneys' fees) with pendent state law claims, and if the plaintiff actually prevails on the state law claims while the court fails to address the federal issue, the court may award attorneys' fees on the basis of the state law claims. Cases such as *Maher v. Gagne*, 448 U.S. 122 (1980) and *Plott v. Griffiths*, 938 F.2d 164 (10th Cir. 1991), fall within the scope of this rule. Yet, in these cases, the common thread is that the party seeking attorneys' fees *actually prevailed* on the pendent state law claims. So, for example, *Maher v. Gagne* stated that "attorneys' fees may be allowed even though the court declines to enter judgment for the plaintiff on that [substantial federal] claim, *so long as the plaintiff prevails on the non-fee [state] claim* . . . . 448 U.S. at 133 (emphasis added).

Similarly, in *Plott v. Griffiths*, the court of appeals recognized that "under *Maher*, when a plaintiff raises both a substantial constitutional claim and a pendent state law claim which is closely factually related, *and the plaintiff prevails on the state claim*, he is entitled to an award of attorneys' fees under section 1988 even though the district court does not address the constitutional claim." 938 F.2d at 167 (emphasis added).

The situation presented here is totally at variance with the results obtained in *Maher* or *Plott*, however. In this case, the intervenor prevailed on the non-fee federal claim, while the court of appeals failed to address what the intervenor regards as pendent state claims. Thus, the reasoning of the *Maher/Plott* line of cases, which is predicated on the requirement that the party actually prevailed on the state law claims, is inapplicable here.

The other missing factor in this case is that in the *Maher/Plott* line of cases, the federal claim was a civil rights violation, under which attorneys' fees could be awarded pursuant to the Civil Rights Attorneys' Fees Awards Act of 1976, 42 U.S.C. § 1988. In this case, the Tribe's claim was asserted under the Indian Child Welfare Act; a federal statute that makes no provision for attorneys' fees.

In fact, relevant case law demonstrates that it is inappropriate to award the intervenor attorneys' fees under the circumstances presented here. In *F. D. Rich Co. Inc., v. Industrial Lumber Co.*, 417 U.S. 116 (1974), the Supreme Court held that when a party prevails on a non-fee federal claim, it is improper to award attorneys' fees on the grounds that state law would permit the award of attorneys' fees in analogous circumstances. According to the Court, "the Miller Act provides a federal cause of action, and the scope of the remedy as well as the substance of the rights created thereby is a matter of federal not state law." 417 U.S. at 127. This principle has been applied by the circuits in a variety of cases. *See, e.g. Calderon v. Presidio Valley Farmers Association*, 863 F.2d 384, 387 (5th Cir. 1989); *Johnson v. United States*, 780 F.2d 902, 910 (11th Cir. 1986). Similarly here, the intervenor prevailed on a non-fee federal claim, and the fact that she might have been entitled to attorneys' fees if the Court had adjudicated, and she had prevailed on, other state law claims cannot be the basis for an award of attorneys' fees.

In summary, then, the law is well settled that where, as here, the court awards a judgment to a party solely on a non-fee awarding federal claim, the court may not award attorneys' fees simply because state law would have permitted such an award for an analogous state claim, and the court of appeals therefore erred in awarding attorneys' fees against the Comanche Indian Tribe in this case.

CONCLUSION

The issues presented here are important questions of federal law that seriously jeopardize the protections that Congress intended federally recognized Indian tribes to have under the Indian Child Welfare Act. Accordingly, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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August, 1995 Attorneys for Petitioner

APPENDIX A

PUBLISH

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

COMANCHE INDIAN TRIBE OF OKLAHOMA, a federally recognized Indian Tribe,	)	NO. 94-6166
	)	No. 94-6167
Plaintiff-Appellee,	)	
v.	)	
RICHARD E. HOVIS, individually and as Judge of the District Court of Kiowa County; KIOWA COUNTY DISTRICT COURT, of Oklahoma,	)	
Defendants,	)	
and	)	
RHONDA WAHNEE,	)	
Defendant-Intervenor-Appellant	)	

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA (D.C. No. CIV-92-2134-A)

Michael C. Salem (Guy Hurst, Assistant Attorney General, Oklahoma City, Oklahoma, with him on the brief) of Salem Law Offices, Norman, Oklahoma, for appellant.

Glenn M. Feldman of O'Connor, Cavanagh, One East Camelback Road, Phoenix, Arizona, for appellee.

Before **KELLY, BRIGHT*** and **BARRETT,** Circuit Judges.

*The Honorable Myron H. Bright, Senior Judge, United States Court of Appeals for the Eighth Circuit, sitting by designation.

BARRETT, Circuit Judge

Appellants (the District Court of Kiowa County, Oklahoma, Judge Richard E. Hovis, and intervenor, Rhonda Wahnee) appeal from the federal district court's entry of summary judgment in favor of the Comanche Indian Tribe of Oklahoma (the Tribe). See Comanche Indian Tribe of Oklahoma v. Hovis, 847 F. Supp. 871 (W.D. Okla. 1994).

This case arose out of a jurisdictional dispute between the District Court of Kiowa County, State of Oklahoma (State Court) and the Comanche Tribal Children's Court (Tribal Court) regarding which court had jurisdiction to adjudicate a petition to terminate the parental rights of Rhonda Wahnee pursuant to the Indian Child Welfare Act (ICWA), 25 U.S.C. §§ 1901-1963. A brief recitation of the facts material to our disposition follows.

Facts

A. 1985 - 1986

On October 15, 1985, Rhonda Wahnee (Rhonda), a non-Indian, filed for divorce from Stuart Wahnee

(Stuart), an enrolled member of the Tribe, in State Court. At that time, Rhonda and Stuart had two children, Kristy and Shannon,[1] and were living in low-income HUD housing in Mountain View, Oklahoma, outside the Comanche reservation.

In January 24, 1986, Stuart and Rhonda signed a power of attorney giving Stuart's sister, Blanche Wahnee (Blanche), an enrolled member of the Tribe, custody of Kristy.

In May, 1986, the Assistant District Attorney for Kiowa County, Oklahoma, filed separate petitions on behalf of Shannon and Kristy to terminate Rhonda's parental rights in the State Court.[2] At the same time, the State Court entered a divorce decree granting Rhonda and Stuart a divorce while staying the determination of custody and child support until resolution of the pending juvenile proceeding regarding termination of Rhonda's parental rights. In this regard, we note that § 1903(1) of the ICWA defining "child custody proceeding" does not include an award, in a divorce proceedings, of custody to one of the parents, see *infra* part I. 25 U.S.C. § 1903(1); see also In re O.E.M. 808 P.2d 684, 687-88 (Okla. 1991).

On June 16, 1986, the State Court concluded that Kristy was a deprived child and ordered Rhonda to comply

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[1]Shannon died in 1990 of causes unrelated to this action. Therefore, the dispute revolves solely around Kristy.

[2]The petitions were filed at the request of Stuart based on alleged child abuse and neglect of Shannon while he was living with Rhonda and her boyfriend. It appears from the record that the petition on behalf of Kristy was filed as a matter of standard procedure.

with the Service Plan filed with the order. The Service Plan established the requirements that Rhonda must fulfill in order to demonstrate to the State Court that she could provide a safe and stable home for Kristy.

B. 1987

On May 27, 1987, at a hearing in State Court, the State Court noted that the Tribal Court wished to assume jurisdiction over the termination of parental rights proceeding. At that time, Rhonda orally objected to the transfer of the proceeding to Tribal Court.

On June 9, 1987, the Tribal Court filed a formal motion to transfer jurisdiction pursuant to S 1911(b) of the ICWA. The State Court granted the motion on June 11, 1987. On June 26, 1987, the Tribal Court accepted jurisdiction of the juvenile proceeding for termination of Rhonda's parental rights.

C. 1991

On January 25, 1991, Rhonda filed a motion in State Court to vacate the June 11, 1987, order of transfer. The basis of her motion was that her oral objection at the hearing on May 27, 1987, made transfer to the Tribal Court pursuant to § 1911(b) improper.[3]

On February 11, 1991, the State Court vacated its June 11, 1987, order of transfer to the Tribal Court, concluding that in view of Rhonda's objection, the transfer

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[3]We note that there had been no final adjudication of Rhonda's parental rights in Tribal Court after several hearings over three and one-half years, and that on October 6, 1990, the Tribal Court, on its own motion, continued all court cases indefinitely because of "budgetary constraints and resultant cutbacks in court judicial activity."

pursuant to § 1911(b) was void.

On February 27, 1991, the Tribe filed, in State Court, a motion to transfer pursuant to the ICWA § 1911(a), claiming that, based on the facts of the case, the Tribal Court had exclusive jurisdiction.

On March 8, 1991, the Tribe filed another motion in State Court requesting the State Court to rescind its February 11, 1991, order or, in the alternative, to transfer the proceedings back to Tribal Court pursuant to §§ 1911(a). The Tribe alleged that the Tribal Court, not the State Court, had exclusive jurisdiction pursuant to § 1911(a) to determine the "child custody proceedings" regarding Kristy and that the State Court lost jurisdiction to vacate its prior transfer order once the transfer was complete.

On March 10, 1991, Rhonda filed a motion for summary judgment in opposition to the Tribe's motions to transfer, claiming that at the commencement of the juvenile proceeding Kristy was not a resident of nor domiciled on the reservation.

On March 29, 1991, the Tribe filed a response to Rhonda's motion of March 10, 1991, requesting the State Court deny Rhonda's motion for summary judgment and grant summary judgment to the Tribe, or in the alternative, set the matter over for a factual hearing on the issue of Kristy's domicile.

On June 5, 1991, the State Court denied the Tribe's motions and entered summary judgment in favor of Rhonda.[4] See In re Shannon James Wahnee; DOB:

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[4]The order reflects that it was written on April 2, 1991, but it is unclear when it was actually filed. However, it is clear that the Tribe appeared, through counsel, by telephone at the April 2, 1991, hearing on the motions.

4.19.84 and Kristy Wahnee; DOB: 7/19/82, No. JFJ-86-12 (D. Ct. 3d Jud. D. Okla. Kiowa County June 5, 1991) Based on the evidence presented in the motion for summary judgment, the State Court found that at the time of the filing of the juvenile proceeding in the State Court, Rhonda and Stuart were not residing on tribal land. Therefore, the State Court concluded that 1911(a) did not apply. The court further ruled that the order transferring the case to the Tribal Court was void ab initio due to Rhonda's timely objection and that the Tribal Court never obtained personal jurisdiction over Rhonda. Although Blanche appealed the State Court's decision to the Oklahoma Supreme Court, the Tribe did not.

D. 1992-1994

On October 28, 1992, the Tribe filed this action in the federal district court seeking a declaratory judgment as to whether the Tribal Court or the State Court has exclusive jurisdiction to adjudicate the proceeding regarding termination of Rhonda's parental rights. In its motion for summary judgment the Tribe sought a declaratory judgment that pursuant to § 1911(a), the Tribal Court had exclusive jurisdiction.

On March 28, 1994, the federal district court ruled that: (1) the Tribal Court had exclusive jurisdiction pursuant to § 1911(a) based on its findings that Kristy was a resident of the reservation, domiciled on the reservation,[5] and a ward of the Tribal Court; and,

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[5]The federal district court agreed with the Tribe that as of January 24, 1986, the date that the power of attorney was executed giving Blanche temporary custody of Kristy, Kristy lived exclusively with Blanche, who is a resident of the reservation, thus rendering Kristy a resident of the

alternatively, (2) the State Court had no jurisdiction to reconsider and vacate the June 11, 1987, transfer order.

Issues

On appeal, Appellants contend that: (1) the federal district court erred in its determination that the residence and domicile of Kristy were the residence and domicile of Blanche and not that of her parents; (2) the federal district court erred in entering summary judgment where there were material questions of fact in issue regarding the domicile and residence of Kristy; (3) the federal district court improperly sat in appellate status of the State Court instead of giving full faith and credit to the State Court's rulings; and (4) the federal district court improperly assumed jurisdiction over this action.

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reservation. Comanche Indian Tribe of Oklahoma v. Hovis, 847 F. Supp. 871, 878 (W.D. Okla. 1994). However, the State Court found that Kristy's parents were not residing on trust land as of the date of the filing of the termination of parental rights proceeding in May 1986. Although we do not reach the issue of Kristy's residence and domicile at the time of the filing of the termination of parental rights proceeding, we observe that the Supreme Court has stated that "[s]ince most minors are legally incapable of forming the requisite intent to establish a domicile, their domicile is established by their parents." Mississippi Band of Choctaw Indians v. Holy" field, 490 U.S. 30, 48 (1989). See In re Guardianship of D.L.L. and C.T.,L., 291 N.W.2d 278, 282 (S.D. 1980) (residence and domicile of children is that of the parents until legally changed and grant of temporary custody to person residing outside the reservation did not constitute abandonment or emancipation on the part of the parent).

Discussion

I.

Initially, it is important to clarify exactly what proceeding the State Court and Tribal Court are disputing over. It is clear that neither party disputes that Kristy is an "Indian child" pursuant to the ICWA. See 25 U.S.C. § 1903(4). However, it is not clear what "proceeding, is at the heart of this jurisdictional dispute.

The main focus of the ICWA is in its provisions concerning jurisdiction over Indian child custody proceedings. Specifically, § 1911 provides:

> (a) Exclusive jurisdiction
>
> An Indian tribe shall have jurisdiction exclusive as to any State over any child custody proceeding involving an Indian child who resides or is domiciled within the reservation of such tribe, except where such jurisdiction is otherwise vested in the State by existing Federal law. Where an Indian child is a ward of the tribal court, the Indian tribe shall retain exclusive jurisdiction, notwithstanding the residence or domicile of the child.
>
> (b) Transfer of proceedings
>
> In any State court proceeding for the foster care placement of, or termination of parental rights to, an Indian child not domiciled or residing within the reservation of the Indian child's tribe, the court, in the absence of good cause to the contrary, shall transfer such proceeding to the jurisdiction of the tribe, absent objection by either parent, upon the petition of either parent or the

Indian custodian or the Indian child's tribe

25 U.S.C. 1911. While § 1911(a) creates exclusive jurisdiction in the Tribal Court over "child custody proceedings, in certain circumstances, § 1911(b) creates concurrent but presumptively Tribal Court jurisdiction over specific child custody proceedings in other circumstances. Mississippi Band of Choctaw Indians v. Holyfield, 490 U.S. 30, 36 (1989).

The ICWA specifically defines which "child custody proceedings" are within its purview. Section 1903(1) provides that:

> (1) "child custody proceeding" shall mean and include -
>
> (i) "foster care placement" . . .;
>
> (ii) termination of parental rights" which shall mean any action resulting in the termination of the parent-child relationship;
>
> (iii) "preadoptive placement"
>
> (iv) adoptive placement"
>
> Such term or terms shall not include a placement based upon . . . an award, in a divorce proceeding, of custody to one of the parents.

25 U.S.C. 1903(1).

Clearly, the ICWA does not apply to "child custody proceedings" pursuant to divorce proceedings. 25 U.S.C. § 1903(1); DeMent v. Oglala Sioux Tribal Court, 874 F.2d 510, 514 (8th Cir. 1989) (the ICWA does not apply to custody determinations pursuant to divorce proceeding). Therefore, the State Court could not transfer its jurisdiction to the Tribal Court to make custodial

determinations regarding Kristy pursuant to the divorce proceeding; the State Court presently retains this jurisdiction, inasmuch as it was stayed pending the outcome of the termination of parental rights proceeding.

However, the ICWA specifically covers proceedings involving the termination of parental rights. 25 U.S.C. § 1903(l)(iii). Therefore, once the State Court proceeding to terminate Rhonda's parental rights was initiated in May, 1986, the ICWA came into play and jurisdiction became an issue.

At that time, the State Court retained jurisdiction to determine the custody of Kristy pursuant to the divorce proceeding and the only "proceeding" eligible for transfer was the proceeding involving the termination of parental rights. Therefore, this dispute involves only the question as to which court - the Tribal Court or the State Court - has jurisdiction over the proceeding to terminate Rhonda's parental rights.

Before we can reach the merits of Appellant's arguments (1), (2), and (3), we must determine whether the federal district court had jurisdiction to render a declaratory judgment that the Tribal Court had exclusive jurisdiction to decide the issue of termination of Rhonda's parental rights. It is not clear that the parties understood the jurisdictional distinction between the termination of parental rights proceeding and the actual custody determination pursuant to the divorce proceeding which the State Court stayed. However, as stated earlier,this dispute involves only the termination of parental rights.[6]

---

[6]It is not clear that the parties understood the jurisdictional distinction between the termination of parental rights proceeding and the actual custody determination pursuant to the divorce proceeding which

We are obligated to satisfy ourselves as to our own jurisdiction and this obligation extends to an examination of the federal district court's jurisdiction as well. Alexander v. Anheuser-Busch Companies, Inc., 990 F.2d 536, 538 (10th Cir. 1993). We review jurisdictional issues de novo. FDIC v. Hulsey, 22 F.3d 1472, 1479 (10th Cir. 1994).

A. Collateral Estoppel

Appellants contend that the federal district court improperly assumed jurisdiction over this case, i.e., that this issue had previously been fully litigated in the State Court; therefore, the federal district court was required to recognize the same preclusive effect that an Oklahoma state court would and refuse to relitigate the issue.

By statute, federal courts must give the same preclusive effect to state court judgments that those judgments would be given in the courts of the state in which the judgments were rendered. See 28 U.S.C. § 1738; Kremer v. Chemical Constr. Corp., 456 U.S. 461, 466 (1982); Jarrett v. Gramling, 841 F.2d 354, 356 (10th Cir. 1988). Therefore, we must consider the issue and claim preclusion rules of Oklahoma.

In Oklahoma the doctrine of collateral estoppel is known as "estoppel by judgment." Hildebrand v. Gray, 866 P.2d 447 (Okla. App. 1993). As stated by the Oklahoma Supreme Court:

> Under the doctrine of collateral estoppel, a judgment, whether in favor of plaintiff or defendant, is conclusive in a subsequent action between the parties on a different

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the State Court stayed. However, as stated earlier, this dispute involves only the termination of parental rights proceeding.

> claim, as to issues raised in the subsequent action which were actually litigated and determined in the prior action; the test in each case is whether a given issue was necessary to the determination in the former trial.

Laws v. Fisher, 513 P.2d 876, 877 (Okla. 1973) (citations omitted). The Oklahoma Supreme Court has stated that "the inquiry is whether the question of fact in issue in the latter case is the question of fact actually determined in the former action, and not what might have been litigated and determined therein." Runyan v. City of Henryetta, 321 P.2d 689, 693 (Okla. 1958).

We believe the doctrine of collateral estoppel precluded the Tribe from relitigating its claims in federal district court. From the record it is clear that the allegations concerning the applicability of § 1911(a), Kristy's residence and domicile, raised by the Tribe in the federal district court, were the same allegations advanced by the Tribe (and Blanche) in State Court. The issue in the State Court in 1991, was whether the Tribe had exclusive jurisdiction pursuant to § 1911(a); the same issue that the Tribe asserted in the federal district court. Although the Tribe attempted to disguise the issue as a declaratory judgment, in reality it asked the federal district court to consider the same issue, applicability of § 1911(a), that the State Court had already decided on the merits.

The State Court reached the merits of the Tribe's § 1911(a) exclusive jurisdiction claim when it determined that § 1911(a) did not apply because Rhonda and Stuart were not residing on tribal land when the original petition was filed in State Court. Since the only issue involved the applicability of § 1911(a), the State Court's findings of residence and domicile were necessary to its final

judgment.

We now turn to whether there was identity of parties in the State Court and federal district court. The Oklahoma Supreme Court has stated that for "a judgment to be estoppel, there must be an identity of parties, as well as of subject-matter., Hildebrand, 866 P.2d at 450. In determining whether there is identity of parties, the court stated:

> the parties between whom the judgment is claimed to be an estoppel must have been parties to the action in which it was rendered in the same capacities and in the same antagonistic relation, or in privity with the parties in such former action.

Id.

In both actions, Rhonda and the Tribe were parties aligned in the same adversarial posture. The Tribe voluntarily entered the State Court proceedings in 1991 when it filed its motion to rescind the February 11, 1991, order and, in the alternative, to transfer the action to Tribal Court pursuant to § 1911(a), and by its response in opposition to Rhonda's motion for summary judgment. At all times relevant to this dispute, the Tribe has been treated as a party by all those involved in the proceeding. The Tribe has not challenged its status as such.[7] Rhonda became a party in the federal district court once she intervened in the juvenile proceeding. Alvarado v. J.C. Penney Co., Inc., 997 F.2d 803, 805 (10th Cir. 1993) (once a party intervenes, it becomes a full participant in the suit

---

[7]In the federal district court, the Tribe did challenge the status of the State Court itself and that of Judge Hovis as to whether they were "parties" in the State Court proceeding for purposes of issue preclusion.

and is treated just as if it were an original party vulnerable to complete adjudication of issues in litigation between intervenor and adverse party).

There is no material difference in the "quality" of the parties in the State Court and in the federal district court; the same facts form the basis of both suits; and the Tribe essentially sought identical relief in both courts: to invoke the ICWA and obtain exclusive jurisdiction in the Tribal Court over the termination of parental rights proceeding.

Therefore, we conclude that the Oklahoma courts would consider the Tribe's suit here barred by collateral estoppel. Once the Tribe chose a forum in which to litigate the application of the ICWA, it could not change forums simply because it did not like the outcome.

B. 25 U.S.C. § 1914

At oral argument, the Tribe asserted that § 1914 of the ICWA grants the Tribe the right to challenge the State Court's ruling on § 1911(a) in the federal district court as a court of "competent jurisdiction."

> Section 1914 of the ICWA provides:
>
> Any Indian child who is the subject of any action for foster care placement or termination of parental rights under State law, any parent or Indian custodian from whose custody such child was removed, and the Indian child's tribe may petition any court of competent jurisdiction to invalidate such action upon a showing that such action violated any provision of section 1911, 1912, and 1913 of this title.

25 U.S.C. S 1914. Sections 1911, 1912, and 1913 are the general substantive provisions of the ICWA.

The question before us is not whether the federal district court is a "court of competent jurisdiction." Rather the question is whether the Tribe can institute an action in federal district court after it has lost in state court following full consideration, briefing, and argument on the identical issue of fact and law relating to jurisdiction to terminate parental rights.

In Kiowa Tribe of Oklahoma v. Lewis, 777 F.2d 587, 591-92 (10th Cir. 1985), cert. denied, 479 U.S. 872 (1986), the Tribe moved to intervene in a Kansas state district court proceeding where a non-Indian couple petitioned for adoption of a child enrolled as a member of the Tribe. After considering briefs filed by the Tribe and the couple, the state district court held that the ICWA did not apply and denied the Tribe's motion to intervene on that basis. The Tribe appealed the denial of its motion to intervene to the Kansas Supreme Court, where the court considered briefs and entertained oral argument by counsel for the Tribe and other interested parties. The Kansas Supreme Court affirmed the state district court's judgment that the ICWA was inapplicable.

Thereafter, the Tribe filed an action in the federal district court for the District of Kansas, contending that the "court of competent jurisdiction, language in 25 U.S.C. § 1914 supported its claim that federal district courts are not precluded under 28 U.S.C. § 1738 from independently considering the propriety of any judicial determination regarding the applicability of the ICWA. The federal district court dismissed the Tribe's suit on the grounds that res judicata and collateral estoppel precluded relitigating the ICWA's applicability. In affirming, we observed:

> The question before us is not whether the federal court is a "court of competent jurisdiction," entitled to protect an Indian tribe's interest in foster care placement or

> terminations of parental rights in Indian children in a case in which the tribe sought to assert its rights under the ICWA *before* it sought to intervene in the state proceedings. The question before us is not even whether the Tribe could have brought suit in federal court after the state district court denied it the right to intervene. Rather, after its attempted intervention in the state court was denied because the court found the ICWA was inapplicable, the Tribe appealed that determination to the Kansas Supreme Court. There, after full consideration, briefing, and argument, it lost. The question before us is therefore whether the Tribe's taking an appeal to the state supreme court foreclosed the Tribe from relitigating in a later independent federal district court action.

Kiowa, 777 F.2d at 592 (footnote omitted).

Under Kiowa, it is clear that § 1914 is not an independent ground to relitigate state court decisions. Id. Once the Tribe chose to litigate in State Court, review of the State Court's decision was limited to timely appeal to the state appellate courts and was not "appealable" in federal district court. Under the circumstances presented in this case, we must honor the judgment rendered on the merits by the State Court.

Accordingly, we **REVERSE** the judgment of the federal district court, and **REMAND** for entry of an appropriate judgment in conformity with this opinion.

PNN0DB70

APPENDIX B

PUBLISH

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

COMANCHE INDIAN TRIBE OF OKLAHOMA, a federally recognized Indian Tribe,	)	NO. 94-6166
	)	No. 94-6167
Plaintiff-Appellee,	)	
v.	)	
RICHARD E. HOVIS, individually and as Judge of the District Court of Kiowa County; KIOWA COUNTY DISTRICT COURT, of Oklahoma,	)	
Defendants,	)	
and	)	
RHONDA WAHNEE,	)	
Defendant-Intervenor-Appellant	)	

ORDER
Entered May 19, 1995

Before KELLY, BRIGHT*, and BARRETT, Circuit Judges.

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*The Honorable Myron H. Bright of the United States Court of Appeals for the Eighth Circuit, sitting by designation.

This matter comes on for consideration of appellee's petition for rehearing and suggestion for rehearing in banc.

Upon consideration whereof, the petition for rehearing is denied by the panel that rendered the decision.

In accordance with Rule 35(b), Federal Rules of Appellate Procedure, the suggestion for rehearing in banc was transmitted to all of the judges of the court who are in regular active service. No member of the panel and no judge in regular active service on the court having requested that the court be polled on rehearing in banc, Rule 35, Federal Rules of Appellate Procedure, the suggestion for rehearing in banc is denied.

Entered for the Court

PATRICK FISHER, Clerk
/s/ Opal A. Carter
By Opal A. Carter
Deputy Clerk

PNN0DB6F

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

COMANCHE INDIAN TRIBE OF OKLAHOMA, a federally recognized Indian Tribe,	)	NO. 94-6166
	)	No. 94-6167
Plaintiff-Appellee,	)	
v.	)	
RICHARD E. HOVIS, individually and as Judge of the District Court of Kiowa County; KIOWA COUNTY DISTRICT COURT, of Oklahoma,	)	
Defendants,	)	
and	)	
RHONDA WAHNEE,	)	
Defendant-Intervenor-Appellant	)	

ORDER
Filed July 20, 1995

Before KELLY, BRIGHT*, and BARRETT, Circuit Judges.

*The Honorable Myron H. Bright of the United States Court of Appeals for the Eighth Circuit, sitting by designation.

Appellant's motion for leave to file a reply is granted. The reply received July 5, 1995, is ordered filed as of the date received.

Appellant's motion for attorney fees and costs is granted. This matter is remanded to the United States District Court for the Western District of Oklahoma to determine the proper amount to award for defense of this proceeding in district court and on appeal. Within fourteen days of the date of this order appellant may file a cost bill on appeal.

Judge Bright dissents from the award of attorney fees.

Entered for the Court

/s/ Patrick Fisher
PATRICK FISHER, Clerk

PNN0DB6F

APPENDIX D

UNITED STATES DISTRICT COURT FOR
WESTERN DISTRICT OF OKLAHOMA

COMANCHE INDIAN TRIBE OF OKLAHOMA,	)	
Plaintiff,	)	No. CIV-92-2134-A
v.	)	
THE HONORABLE RICHARD E. HOVIS, individually and as Judge of the District Court of Kiowa County; State of Oklahoma; THE DISTRICT COURT OF KIOWA COUNTY, STATE OF OKLAHOMA,	)	
Defendants,	)	
and	)	
RHONDA WAHNEE,	)	
Intervenor.	)	

JUDGMENT

Pursuant to the Order issued on the 25 day of March, 1994, judgment is hereby entered in favor of plaintiff, Comanche Indian Tribe of Oklahoma.

. . .

It is so ordered this 25 day of March, 1994.

/s/ Wayne Alley
WAYNE E. ALLEY
United States District Judge

D-3

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF OKLAHOMA

FILED
MAR 23, 1994

COMANCHE INDIAN TRIBE OF OKLAHOMA,	)	
Plaintiff,	)	No. CIV-92-2134-A
v.	)	
THE HONORABLE RICHARD E. HOVIS, individually and as Judge of the District Court of Kiowa County; State of Oklahoma; THE DISTRICT COURT OF KIOWA COUNTY, STATE OF OKLAHOMA,	)	
Defendants,	)	
and	)	
RHONDA WAHNEE,	)	
Intervenor.	)	

ORDER

This matter is before the Court on the Motion for Summary Judgment, pursuant to Fed. R. Civ. P. 56, filed

by plaintiff, Comanche Indian Tribe of Oklahoma ("the Tribe").[1] Defendants, Honorable Richard E. Hovis ("Judge Hovis") and District Court of Kiowa County, State of Oklahoma ("the State Court"), and intervenor, Rhonda Wahnee, have filed a response in opposition to the motion. The Tribe has filed a reply thereto, and the motion is at issue.

I.

This is a jurisdictional dispute concerning an eleven-year old Indian child, Kristy Wahnee ("Kristy"), who has been subjected to custody litigation in both the State Court and the Comanche Tribal Children's Court ("the Tribal Court").[2] At issue is which of the two courts--the State Court or the Tribal Court--has jurisdiction to adjudicate matters relating to Kristy pursuant to the Indian Child Welfare Act of 1978 ("ICWA"), 25 U.S.C. §§ 1901-1963, and whether jurisdiction in one or the other is exclusive.

The undisputed material facts underlying this action are that Kristy was born at the U.S.P.H.S. Indian Hospital ("Indian Hospital") in Lawton, Oklahoma on July 19, 1982, to Stuart Wahnee, a Comanche Indian, and Rhonda Wahnee, a non-Indian. After Kristy's birth, the Wahnee family lived primarily on the Kiowa-Comanche-Apache ("KCA") reservation in Lawton, Oklahoma. On

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[1]The Tribe is a federally recognized Indian tribe. See 53 Fed. Reg. 52829-30 (Dec. 29, 1988).

[2]The Tribal Court is an Indian tribal court established by the Tribe to conduct child custody proceedings on tribal land.

April 19, 1984, Kristy's brother, Shannon Wahnee ("Shannon"), was born at the Indian Hospital. In July 1985, the Wahnee family moved into low income HUD housing in Mountain View, Oklahoma, outside a reservation. Rhonda Wahnee filed for divorce from Stuart Wahnee on October 15, 1985.

On January 24, 1986, Stuart and Rhonda Wahnee executed a power of attorney granting custody and control of Kristy to her paternal aunt, Blanche Wahnee. The power of attorney reads as follows:

> That I, Rhonda Wahnee & Stuart Wahnee . . . have made, constituted and appointed, and by these parents [sic] do make, constitute and appoint Blanche Wahnee . . . my true and lawful attorney, for me, and in my name, place and stead, and to my use to act for me in regards to my child Khristy [sic] Wahnee . . . and to consent to and sign any necessary documents pertaining to any and all medical needs and school needs and records and to keep said child in their custody until such a time as I am able to provide for and to care for said child myself and to act in my stead regarding said child as I myself would have the right to act, giving my said attorney full power to do everything whatsoever requisite and necessary to be done in the premises, as fully as I could do if personally present, with full power of substitution and revocation, hereby ratifying and confirming all that my said attorney, or his substitute shall lawfully do, or cause to be done, by virtue hereof.

Power of Attorney at 1. Although there is some dispute as to the precise date when Kristy began living full-time with Blanche Wahnee, Kristy lived with Blanche Wahnee on January 24, 1986, the date the power of attorney was executed, and has lived with her ever since. Kristy's brother Shannon, however, continued to live with his mother.

Blanche Wahnee, Stuart Wahnee and Kristy are enrolled members of the Tribe. Blanche Wahnee owns a home on the KCA reservation where she stays during the summer months. She regards this home as her domicile. During the school year, she is in Lawrence, Kansas, where she teaches at the Haskell Indian College. Kristy stays with her aunt on the reservation in the summer and accompanies her to Kansas during the school year.

On May 2, 1986, the Tribal Court granted temporary custody of Shannon to his paternal grandmother after he was physically abused while at his mother's home. No party objected to the Tribal Court's jurisdiction. Thereafter, on May 16, 1986, at the request of Stuart Wahnee, the Assistant District Attorney for Kiowa County, Oklahoma filed a petition in the State Court requesting the State Court to determine that Shannon was a deprived child and to terminate Rhonda Wahnee's parental rights. As a matter of standard procedure, the petition also included Kristy. A hearing was held in the State Court on the matter on May 27, 1987, and the State Court noted that the Tribal Court wished to assume jurisdiction over the case. Rhonda Wahnee attended the hearing with her court appointed counsel, and, through counsel, orally objected to the proposed transfer to the Tribal Court. The case was continued in State Court until July 27, 1987.

On June 9, 1987, the Tribal Court filed a motion in the State Court to transfer the case to the Tribal Court

pursuant to the ICWA, 25 U.S.C. § 1911(b).[3] The State Court issued an order to transfer, granting the motion on June 11, 1987. The Tribal Court issued an order accepting jurisdiction on June 26, 1987, and made Shannon and Kristy wards of the Tribal Court. On November 28, 1988, the Tribal Court, after a full hearing and a review hearing, specifically held: "The Comanche Tribal Children's Court has Personal and Subject Matter jurisdiction over this matter all in accord with the Comanche Indian Child Welfare Code and the Indian Child Welfare Act of 1978, P.L. 95-608."

Between September 4, 1987, and August 16, 1990, the Tribal Court conducted several custody and related hearings at which the Tribal Court recited that it had jurisdiction over both the subject matter and the parties. The majority of the hearings were attended by all parties. Rhonda Wahnee did not file any objections regarding the Tribal Court's jurisdiction, nor object to any of the specific hearings. On June 5, 1990, Shannon died.

On February 11, 1991, Rhonda Wahnee appeared through counsel in the State Court on a motion to vacate its order of transfer. The basis of the motion was that Rhonda Wahnee's oral objection to the transfer of the case at the May 27, 1987, hearing, made transfer of the action to the Tribal Court improper under the ICWA, 25 U.S.C. § 1911(b). The matter was heard by Judge Hovis, who issued an order vacating the transfer. Judge Hovis concluded that in view of Rhonda Wahnee's prior objection, the transfer order was void pursuant to § 1911(b).

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[3]The Tribal Court also moved for transfer of the case under the Comanche Indian Child Welfare Code, 1-1-5(1); however, that code is not at issue in this case.

On March 8, 1991, the Tribe filed in the State Court a motion requesting the State Court to rescind its February 11, 1991, order, or, in the alternative, to transfer the action back to the Tribal Court. The Tribe asserted that pursuant to the ICWA, 25 U.S.C. § 1911(a) , the Tribal Court, not the State Court, had exclusive jurisdiction over Kristy. The Tribe further alleged, inter alia, that the State Court had no jurisdiction to vacate its prior transfer order; because once the transfer was done, the State Court lost all power in the case.

The State Court issued an order on June 5, 1991, denying the Tribe's motion to transfer and entering summary judgment in favor of Rhonda Wahnee. See In re Shannon James Wahnee; DOB: 4/19/84 and Kristy Wahnee; DOB: 7/19/82, No. JFJ-86-12 (D. Ct. 3d Jud. D. Okla. Kiowa County June 5, 1991). Judge Hovis found that at the time of the filing of the original petition in the State Court, Rhonda and Stuart Wahnee were not residing on tribal land and therefore 25 U.S.C. § 1911(a) did not apply. He further ruled that the order transferring the case to the Tribal Court was void ab initio due to Rhonda Wahnee's timely objection. Blanche Wahnee appealed to the Supreme Court of Oklahoma through an application to assume original jurisdiction. Her application was denied on September 24, 1991.

On October 17, 1991, the Tribe filed in the Tribal Court a motion to intervene and a motion for summary judgment requesting the Tribal Court to reaffirm its repeated holdings that it had jurisdiction over Kristy's case. The Tribal Court issued an extensive order on February 5, 1992, granting summary judgment in favor of the Tribe and holding that the Tribal Court had exclusive jurisdiction to adjudicate Kristy's case pursuant to 25 U.S.C. § 1911(a) based on its findings that Kristy's was a resident of the reservation, was a domiciliary of the reservation, and was

a ward of the Tribal Court. See In re Kristy Ann Wahnee; DOB 07/19/82, No. JV-86-9 (Comanche Tribal Child. Ct. Feb. 5, 1992). The action in this Court followed.

The Tribe's complaint in this Court, filed on October 28, 1992, seeks a declaratory judgment as to whether the Tribal Court or the State Court has exclusive jurisdiction to adjudicate matters relating to Kristy. Alternatively, the Tribe seeks a declaratory judgment directing that the case be transferred to the District Court of Douglas County, Kansas. Rhonda Wahnee filed a motion to intervene as a defendant on November 25, 1992, which the Court granted on December 21, 1992.

Motions to dismiss were filed by the State Court and Judge Hovis on December 8, 1992, and by Rhonda Wahnee on December 31, 1992. The Tribe filed responses thereto, and the Court held a hearing on the motions on July 21, 1993. The Court granted the motions to dismiss as to the Tribe's application to transfer, but denied the motions as to the overall jurisdictional dispute presented by this action. The matter is presently before the Court on the next round of motions, the Tribe's motion for summary judgment.

The Tribe's motion for summary judgment seeks an order from the Court declaring that pursuant to the ICWA, 25 U.S.C. § 1911(a), the Tribal Court has exclusive jurisdiction to adjudicate matters relating to Kristy. The Tribe also moves the Court to enjoin defendants from entering or enforcing any orders with regard to Kristy, other than transferring all matters regarding Kristy to the Tribal Court. Defendants and Rhonda Wahnee request the Court to deny the motion. They allege that the prerequisites of 25 U.S.C. § 1911(a) are not present here, and, further, that the original transfer of Kristy's case to the Tribal Court was improper under 25 U.S.C. § 1911(b), as Blanche Wahnee objected to that transfer.

II.

Summary judgment is appropriate if the pleadings and affidavits show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). "[A] motion for summary judgment should be granted only when the moving party has established the absence of any genuine issue as to a material fact." Mustang Fuel Corp. v. Youngstown Sheet & Tube Co., 561 F.2d 202, 204 (10th Cir. 1977). Any doubt as to the existence of a genuine issue of material fact must be resolved against the party seeking summary judgment. Board of Educ. v. Pico, 457 U.S. 853, 863 (1982). In addition, the inferences drawn from the facts presented must be construed in the light most favorable to the nonmoving party. Nonetheless, a party opposing a motion for summary judgment may not simply allege that there are disputed issues of fact; rather, the party "must set forth specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(e). "[T]here is no issue for trial unless there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party. If the evidence is merely colorable, or is not significantly probative, summary judgment may be granted." Anderson v. Liberty Lobb, Inc., 477 U.S. 242, 249-50 (1986) (citations omitted). Disputes involving the interpretation and application of statutory language, such as this motion, are appropriate for summary judgment disposition.

III.

The motion before the Court requires an

application of the ICWA.[4] The ICWA was the product

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[4]Although not raised as an issue by the parties, the Court notes that this action concerns an "intrafamily" dispute and that there is a split among jurisdictions as to whether the ICWA applies to such actions. The seminal case for the proposition that the ICWA does not apply to intrafamily disputes is In re Bertelson, 617 P.2d 121 (Mont. 1980), where the non-Indian mother of an Indian child gave custody of her child to the child's paternal grandparents, who were both enrolled members of an Indian tribe. When the mother sought to regain custody, the grandparents refused. The Montana Supreme Court held that the dispute did not fall within the ambit of the ICWA, stating: "The Act is not directed at disputes between Indian families regarding custody of Indian children; rather, its intent is to preserve Indian culture values under circumstances in which an Indian child is placed in a foster home or other protective institution." Id. at 125. Several courts, including the Oklahoma Supreme Court, have expressly refused to follow the Bertelson analysis. In In re O.G.M., 808 P.2d 684 (Okla. 1991), the Oklahoma Supreme Court ruled that the Bertelson analysis is contrary to the express provisions of the Act. The court stated that 25 U.S.C. § 1903(1) defines custody proceedings under the ICWA, and the only two proceedings excluded from the ambit of the ICWA are custody provisions of a divorce decree and delinquency proceedings. Id. at 687-88. Noting that express exceptions in a statute exclude all other exceptions, the court concluded that "[r]ecognition of a third exception--that the act will not apply to intrafamily custody disputes--would require judicial legislation rather than statutory interpretation." Id. at 688. This Court finds that reasoning

of rising concern in the mid-1970's over the consequences to Indian children, Indian families, and Indian tribes of abusive child welfare practices that resulted in the separation of large numbers of Indian children from their families and tribes through adoption or foster care placement, usually in non-Indian homes. Mississippi Band of Choctaw Indians v. Holyfield, 490 U.S. 30, 32 (1989). Studies undertaken by the Association on American Indian Affairs in 1969 and 1974, and presented in ICWA Senate hearings, showed that twenty-five to thirty-five percent of all Indian children had been separated from their families and placed in adoptive families, foster care or institutions. Id. The Senate also focused on the harm to the tribes themselves by the wholesale removal of their children. Id. at 34. For example, Calvin Isaac, Tribal Chief of the Mississippi Band of Choctaw Indians and representative of the National Tribal Chairmen's Association, testified as follows:

> "Culturally, the chances of Indian survival are significantly reduced if our children, the only real means for the transmission of the tribal heritage, are to be raised in non-Indian homes and denied exposure to the ways of their People. Furthermore, these

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persuasive, and acknowledges that the ICWA is applicable here. See also In re A-K-H., 502 N.W.2d 790, 794 (Minn. 1993)("We believe the better-reasoned line of cases holds that the [ICWA] does not exclude intrafamily disputes), review denied, 1993 Minn. LEXIS 593 (Minn. Aug. 24, 1993); In re AB.M. v. M.H., 651 P.2d 1170 (Alaska 1982), cert. denied, 461 U.S. 914 (1983).

> practices seriously undercut the tribes' ability to continue as self-governing communities. Probably in no area is it more important that tribal sovereignty be respected than in an area as socially and culturally determinative as family relationships."

Id. (citing Hearings on S. 1214 before the Subcommittee on Indian Affairs and Public Lands of the House Committee on Interior and Insular Affairs, 95th Cong., 2d Sess. (1978)).

The Congressional findings that were incorporated into the ICWA reflect these sentiments. Id. at 35. The following Congressional findings are set forth at 25 U.S.C. § 1901:

> (3) that there is no resource that is more vital to the continued existence and integrity of Indian tribes than their children . . . ;
>
> (4) that an alarming high percentage of Indian families are broken up by the removal, often unwarranted, of their children from them by nontribal public and private agencies and that an alarming high percentage of such children are placed in non-Indian foster and adoptive homes and institutions; and
>
> (5) that the States, exercising their recognized jurisdiction over Indian child custody proceedings through administrative and judicial bodies, have often failed to recognize the essential tribal relations of Indian people and the cultural and social

> standards prevailing in Indian communities and families.

25 U.S.C. § 1901.

At the heart of the ICWA are its provisions concerning jurisdiction over Indian child custody proceedings, which are codified at 25 U.S.C. § 1911. Holyfield, 490 U.S. at 36; see generally, Michael E. Connelly, Tribal Jurisdiction Under Section 1911(b) of the Indian Child Welfare Act of 1978: Are the States Respecting Indian Sovereignty?, 23 N.M. L. Rev. 479 (1993); Roger A. Tellinghuisen, The Indian Child Welfare Act of 1978: A Practical Guide With [Limited] Commentary, 34 S.D. L. Rev. 660 (1988/89). Section 1911 grants Indian tribes jurisdiction over child custody proceedings.[5] 25 U.S.C. § 1911; Roman-Nose v.

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[5] Section 1911 states in full:

> **(a) Exclusive jurisdiction**
>
> An Indian tribe shall have jurisdiction exclusive as to any State over any child custody proceeding involving an Indian child who resides or is domiciled within the reservation of such tribe, except where such jurisdiction is otherwise vested in the State by existing Federal law. Where an Indian child is a ward of a tribal court, the Indian tribe shall retain exclusive jurisdiction, notwithstanding the residence or domicile of the child.
>
> **(b) Transfer of proceedings; declination by tribal court**
>
> In any State court proceeding for the foster care placement of, or termination of

parental rights to, an Indian child not domiciled or residing within the reservation of the Indian child's tribe, the court, in the absence of good cause to the contrary, shall transfer such proceeding to the jurisdiction of the tribe, absent objection by either parent, upon the petition of either parent or the Indian custodian or the Indian child's tribe: Provided, That such transfer shall be subject to declination by the tribal court of such tribe.

(c) **State court proceedings; intervention**

In any State court proceeding for the foster care placement of, or termination of parental rights to, an Indian child, the Indian custodian of the child and the Indian child's tribe shall have a right to intervene at any point in the proceeding.

(d) **Full faith and credit to public acts, records, and judicial proceedings of Indian tribes**

The United States, every State, every territory or possession of the United States, and every Indian tribe shall give full faith and credit to the public acts, records, and judicial proceedings of any Indian tribe applicable to Indian child custody proceedings to the same extent that such entities give full faith and credit to the public acts, records, and judicial proceedings of any other entity.

(10th Cir. 1992). Specifically, § 1911(a) provides that if the Indian child "resides or is domiciled within the reservation," the Indian tribe has exclusive jurisdiction over child custody proceedings relating to that child, except where jurisdiction is otherwise vested in the state by existing federal law. 25 U.S.C. § 1911(a) Section 1911(a) further provides that if the Indian child is a ward of the tribal court, the Tribe "shall retain exclusive jurisdiction, notwithstanding the residence or domicile of the child." 25 U.S.C. § 1911(a) .

Section 1911(b), on the other hand, applies to state court proceedings for the foster care placement or termination of parental rights in cases where the Indian child is "not domiciled or residing within the reservation." 25 U.S.C. § 1911(b). Section 1911(b) requires a state court to "transfer such proceeding to the jurisdiction of the tribe" upon petition by either parent, the Indian custodian or the child's tribe, absent objection by either parent, good cause to the contrary or declination of jurisdiction by the tribal court. 25 U.S.C. § 1911(b). Section 1911(b) creates concurrent, but presumptively tribal jurisdiction. Holyfield, 490 U.S. at 36.

Section 1911(c) grants the Indian child's tribe and its Indian custodian the right to "intervene at any point" in a state court proceeding for the foster care placement or termination of parental rights of that child. 25 U.S.C. § 1911(c). Finally, § 1911(d) requires all courts in the United States to "give full faith and credit to the public acts, records, and judicial proceedings of any Indian tribe applicable to Indian child custody proceedings" to the same extent that the courts give full faith and credit to those of any other entity. 25 U.S.C. § 1911(d).

In this case, the Tribe alleges that the Tribal Court has exclusive jurisdiction over Kristy's custody proceedings under 25 U.S.C. § 1911(a), as the undisputed facts

establish that Kristy resides within the reservation, is domiciled within the reservation, and is a ward of the Tribal Court. Additionally, the Tribe maintains that pursuant to 25 U.S.C. § 1911(d), the State Court is required to give full faith and credit to the findings of the Tribal Court that it has jurisdiction over the action.

Judge Hovis, the State Court and Rhonda Wahnee, in response, argue that the Tribal Court does not have exclusive jurisdiction over this action under 25 U.S.C. § 1911(a), because Kristy is neither a resident nor domicile of the reservation. They also allege that the Tribal Court's declaration of Kristy as a ward of the Tribal Court was improper since Rhonda Wahnee objected to the transfer of the action as provided by 25 U.S.C. § 1911(b). They further assert that under 25 U.S.C. § 1911(d), the State Court is not required to afford full faith and credit to the Tribe's determinations that it has jurisdiction.

IV.

As noted earlier, when an Indian child "resides or is domiciled within the reservation" or is a ward of the tribal court, the tribal court has exclusive jurisdiction over custody proceedings relating to that child. 25 U.S.C. § 1911(a). Thus, a plain language reading of 25 U.S.C. § 1911(a) mandates that jurisdiction over Kristy's custody dispute rests exclusively with the Tribal Court if Kristy: (1) is a resident of the reservation; (2) is a domicile of the reservation; or, (3) is a ward of the Tribal Court. 25 U.S.C. § 1911(a). Under that language, the Tribal Court has exclusive jurisdiction if any of these conditions is met. See Holyfield, 490 U.S. at 47 (acknowledging that in the absence of a statutory definition courts start with the assumption that the legislative purpose is expressed in the ordinary meaning of the words used); Cave Springs Pub.

Sch. Dist. v. Blair, 613 P.2d 1046, 1048 (Okla. 1980)("Where the language of a statute is plain and unambiguous, and its meaning is clear . . the statute will be accorded the meaning as expressed by the language therein employed."); Seventeen Hundred Peoria, Inc. v. Tulsa, 422 P.2d 840, 843-44 (Okla. 1966) (statutory construction should ordinarily be done by a consideration of the language of the statute). It is the Tribe's position that all three of the conditions of § 1911(a) are present in this case, thus vesting exclusive jurisdiction over Kristy's custody proceedings in the Tribal Court.

A.

The Tribe first asserts that exclusive jurisdiction over Kristy's custody proceedings rests exclusively with the Tribal Court pursuant to 25 U.S.C. § 1911(a) because Kristy is a "resident" of the KCA reservation. The Tribe argues that it is undisputed that as of at least January 24, 1986, the date the power of attorney was executed, Kristy has lived exclusively with Blanche Wahnee who is a resident of the reservation.[6] Therefore, the Tribe argues, jurisdiction over Kristy's custody dispute rests exclusively with the Tribal Court.

Having reviewed the undisputed evidence in this case and the plain language of § 1911(a), the Court is persuaded to agree. "Residency" status is "determined from the physical fact of that person's living in a particular place." Rosario v. I.N.S., 962 F.2d 220, 224 (2d Cir. 1992) ("Residency means an established abode, for personal or

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[6]The Tribe maintains that the Tribal Court retains exclusive jurisdiction over Kristy even when she leaves the reservation and accompanies her aunt to Kansas.

business reasons, permanent for a time."); see also Martinez v. Bynum, 461 U.S. 321, 330-31 (1983). A person may be a resident of one locality, but be domiciled in another. Holyfield, 490 U.S. at 48; Rosario, 962 F.2d at 224.

Section 1911(a) provides for exclusive tribal jurisdiction if an Indian child "resides or is domiciled within the reservation." 25 U.S.C. § 1911(a) (emphasis supplied). Although the typical case construing the ICWA involves a dispute in which the child is deemed domiciled on the reservation, yet resides off the reservation, see, e.g. Holyfield, 490 U.S. at 47 (where the children at issue had never been physically present on the reservation), this case presents a situation where at all times since the initiation of the custody dispute the Indian child in question resided on the reservation, without regard to her domicile. See Native Village of Venetie I.R.A. Council v. Alaska, 944 F.2d 548, 555 (9th Cir. 1991) ("state courts are powerless to resolve child-custody disputes concerning Indian children who reside on their tribal reservations; jurisdiction is exclusive in the tribe"); In re Adoption of Holloway, 732 P.2d 962, 968 (Utah 1986) ("With respect to those resident on reservations, the tribes' jurisdiction is exclusive."), aff'd Navajo Nation v. District Court for Utah County, Fourth Judicial Dist., 831 F.2d 929 (10th Cir. 1987).

The petition commencing Kristy and Shannon's action was filed on May 16, 1986. The undisputed facts here establish that Kristy has lived with Blanche Wahnee on the KCA reservation since at least January 24, 1986, when Stuart and Rhonda Wahnee executed the power of attorney granting custody and control of Kristy to Blanche Wahnee. There is no evidence indicating that Kristy's residence has changed since that time, other than occasional visits with Rhonda Wahnee. There is also no evidence from which a reasonable conclusion can be

drawn that Kristy's residence, for purposes of the ICWA, is in Kansas.[7] Thus, Kristy has "resided" within the reservation since the initiation of this action.

In view of the undisputed material facts establishing that Kristy has resided within the reservation at all times relevant hereto, the Court concludes that under the express language of 25 U.S.C. § 1911(a), exclusive jurisdiction over custody proceedings relating to Kristy rests exclusively with the Tribal Court, not the State Court. The Court reaches this determination without regard to Kristy's domicile or wardship status.

B.

Although Kristy's residence status is dispositive of this matter, the Tribe further argues that the Tribal Court has exclusive jurisdiction over Kristy under 25 U.S.C. § 1911(a) because Kristy is "domiciled" within the KCA reservation. The Tribe asserts that it is undisputed that Kristy's guardian, Blanche Wahnee, is a domiciliary of the KCA reservation. Therefore, the Tribe argues, Kristy's domicile is the KCA reservation, as Kristy takes the domicile of Blanche.

In Holyfield, 490 U.S. at 47, the Supreme Court was called upon to interpret "domicile" as that term is used in the ICWA.[8] The Court determined that federal law,

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[7]The Court sees no need to address the period of time that Kristy accompanies her aunt to Kansas, as the Court is persuaded that for purposes of this decision Kristy's residence is the reservation.

[8]Holyfield presented a case of unmarried Indian parents who sought an adoption by non-Indians for their newly-born twins. 490 U.S. at 37. Both parents were

enrolled members of an Indian tribe, and were residents and domiciliaries of a reservation. Id. They travelled, however, some 200 miles away from the reservation for the birth of the twins, and executed consent-to-adoption forms in state court. Id. An adoption decree was subsequently entered by the state court, and the tribe moved to vacate the adoption on the ground that under the ICWA, 25 U.S.C. § 1911(a), exclusive jurisdiction over the twins was vested in the tribal court. Id. at 38-39. The state trial court overruled the tribal motion and the Supreme Court of Mississippi affirmed, finding the domicile of the children to be off the reservation. Id. at 39-40.

Looking to 25 U.S.C. § 1911(a), the Supreme Court examined whether under the ICWA definition of "domicile," the children should not be deemed domiciliaries of the reservation due to the following facts: (1) they had never been physically present there, and (2) they were voluntarily surrendered by their parents. Id. at 47. The Court held, first, that federal law, not state law, controlled the definition of "domicile." Id. at 47. Next, the Court determined that domicile is established by physical presence in a place, coupled with an intent to remain there. Id. at 48. The Court noted that "[f]or adults, domicile is established by physical presence in a place in connection with a certain state of mind concerning one's intent to remain there." Id. However, "since most minors are legally incapable of forming the requisite intent to establish a domicile, their domicile is determined by that of their parents." Id. Thus, the Court concluded, it is entirely logical that "'[o]n occasion, a child's domicile of origin will be in a place where the child has never been.'" Id. (quoting Restatement (Second) of Conflict of Laws § 14 cmt. b). As the domicile of the Indian mother (and

not state law, controlled the definition of "domicile" for purposes of the ICWA, stating:

> That we are dealing with a uniform federal rather than a state definition does not, of course, prevent us from drawing on general state-law principles to determine "the ordinary meaning of the words used." Well-settled state law can inform our

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father) had been, at all relevant times, on the reservation, the Court concluded that at their birth the twin babies were also domiciled on the reservation, even though they themselves had never been there." Id. at 48-49.

The Court further found that this result could not be any different simply because the twins were voluntarily surrendered by their mother, as tribal jurisdiction under § 1911(a) "was not meant to be defeated by the actions of individual members of the tribe, for Congress was concerned not solely about the interests of Indian children and families, but also about the impact on the tribes themselves of the large numbers of Indian children adopted by non-Indians." Id. at 49. The Court noted that a rule of domicile that would permit individual Indian parents to defeat the ICWA's jurisdictional scheme by, i.e., giving birth off the reservation, would be inconsistent with the purpose the ICWA was intended to accomplish. Id. at 51-52. Accordingly, the Court concluded that since the twins were domiciled on the reservation when adoption proceedings were begun, the tribal court possessed exclusive jurisdiction pursuant to 25 U.S.C. § 1911(a), Id. at 53.

> understanding of what Congress had in mind when it employed a term it did not define. Accordingly, we find it helpful to borrow established common-law principles of domicile to the extent that they are not inconsistent with the objectives of the congressional scheme.

Id. at 47-48.

In this case, the Tribe maintains that under a federal definition of domicile, Kristy's domicile should be deemed that of Blanche Wahnee. The parties have based arguments on passages in the Restatement (Second) of Conflict of Laws § 22 almost as if it were statutory in effect. In view of this emphasis, the Restatement warrants examination.

The Tribe first argues that comment h to the Restatement § 22 addresses a minor's domicile when the minor is under a guardianship, and provides that the child "should be domiciled in the place where he has been sent by the guardian to live and make his home." Restatement (Second) of Conflict of Laws § 22 cmt. h. The Tribe maintains that Blanche Wahnee is Kristy's guardian, or at least her guardian by estoppel, because it is undisputed that Blanche Wahnee has a legal power of attorney that lawfully vests in her custody and control over Kristy, including the responsibility of taking care of Kristy and managing her property and rights during her minority.[9]

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[9] The Tribe cites Black's Law Dictionary, which defines "guardian" as:

> A person lawfully invested with the power, and charged with the duty, of taking care of the person and managing the property and

In response, defendants and Rhonda Wahnee argue that comment h is not applicable here as it states that the "child's domicil[e] does not follow that of his parents once a guardian of his person has been appointed." Id. They assert that this contemplates a guardian who has been appointed by the Court, and that Blanche Wahnee was not.

The Tribe does not dispute that Blanche Wahnee was never appointed guardian of Kristy by a court, and this Court, therefore, adopts defendants and Rhonda Wahnee's position with respect to this question. Indeed, comment i to the Restatement § 22 expressly states that it is applicable if "the child is abandoned by both parents or by a surviving parent, and no guardian of the child's person is appointed." Id. cmt. i (emphasis supplied). Thus, comment h is not controlling here.

Next, the Tribe alleges that comment i to the Restatement § 22, alternatively, requires the conclusion they seek. Comment i provides:

> [I]f the child is abandoned by both parents or by a surviving parent, and no guardian of the child's person is appointed, the child should acquire a domicil[e] at the home of

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> rights of another person, who, for defect of age, undertaking, or self-control, is considered incapable of administering his own affairs. One who legally has the care and management of the person, or the estate, or both, of a child during its minority.

It also defines "guardian by estoppal" as "one who assumes to act as a guardian without legal authority."

> a . . . person who stands in loco parentis to him and with whom he lives. Absent some compelling reasons to the contrary, the child's domicil[e) should be in the place to which he is most closely related.

Id. The Tribe argues that Blanche Wahnee is a blood relative who has had exclusive and continuous custody of Kristy since January 24, 1986, and that Kristy was abandoned by both of her parents in 1986, when they signed the power of attorney granting to Blanche Wahnee the sole responsibility for Kristy. The Tribe also argues that Rhonda Wahnee has not provided any financial support for Kristy since she has lived with Blanche Wahnee, and alleges that this is further evidence of abandonment. The Tribe further contends that the undisputed evidence clearly establishes that Blanche Wahnee stands in loco parentis to Kristy.

Defendants and Rhonda Wahnee respond that comment i does not require that Kristy's domicile be deemed that of Blanche Wahnee because comment i contemplates abandonment by a parent, and the record here does not indicate that Rhonda Wahnee has abandoned Kristy. They argue that in executing the power of attorney, Rhonda and Stuart Wahnee did not intend to permanently relinquish their parental rights and obligations over Kristy. They contend that the power of attorney did not purport to describe final arrangements for Kristy's care and custody, and, further, that temporary awards of custody are insufficient to render a temporary custodian's domicile that of the child. They also assert that throughout the State Court proceedings, Rhonda Wahnee has sought and obtained visitation rights with Kristy, and that no determination has been made by a court to finally terminate Rhonda Wahnee's parental rights.

"Domicile" is established by "physical presence in a place in connection with a certain state of mind concerning one's intent to remain there." Holyfield, 490 U.S. at 48. "Since most minors are legally incapable of forming the requisite intent to establish a domicile, their domicile is [usually) determined by that of their parents." Id.; see also Dunlap v. Buchanan, 741 F. 2d 165, 167 (8th Cir. 1984) ("The domicile of a minor is generally determined by reference to another person because minors are legally incapable of forming the requisite intent to regard a place as home"); Clyde IV v. Ludwig Hardware Store Inc., 815 F. Supp. 688, 690 (S.D. N.Y. 1993). However, "[s]pecial rules are applied to determine the domicil[e] of a minor who does not live with a parent." Restatement (Second) of Conflict of Laws § 22. This is the situation the Court addresses in this case.

As argued by the Tribe, comment i to the Restatement § 22 provides that if a child is abandoned by its parents, "the child should acquire a domicil[e] at the home of a . . . person who stands in loco parentis to him and with whom he lives." Id. cmt. i. Furthermore, "the child's domicil(e] should be in the place to which he is most closely related." Id. This Court is unwilling to declare that Kristy has been abandoned by her parents for purposes of Kristy's custody proceedings. Indeed, this is a determination that need not be made here. However, upon consideration of analogous case law that has examined the issue of domicile of a minor who does not live with his parents in the context of determining diversity jurisdiction, the Court is willing to so conclude for purposes of determining jurisdiction over Kristy's action.

In Elliott v. Krear, 466 F. Supp. 444 (E.D. Va. 1979), where an infant was living with his grandparents in the state where he was born and continuously lived, and his divorced mother with custody had recently established

citizenship in another state, the infant was held to be a citizen of his grandparents' state for diversity purposes. The issue in that case was what was the citizenship for diversity jurisdiction purposes of a child who was a minor at the time of injury underlying the dispute and at the time the complaint was filed. Id. at 446. If the mother's citizenship controlled, the court would have jurisdiction. Id. The court analyzed the issue in terms of "citizenship," noting that "[t]he elements necessary to establish citizenship are the same as those to establish domicile: residence combined with an intent to remain indefinitely." Id. at 445. Although the child's mother, a citizen of California at all pertinent times had legal custody, the child actually lived with his grandparents, citizens of Virginia. Id. They provided for his support and had him in their actual custody and control. Id.

The court first looked to the purpose of diversity jurisdiction, which it noted " 'was to give a citizen of one state access to an unbiased court to protect him from parochialism if he is forced into litigation in another state in which he was a stranger and of which his opponent was a citizen.'" Id. at 446 (quoting Ziady v. Curley, 396 F.2d 873, 875 (4th Cir. 1968)). The court then concluded that, under the facts of the case, the purpose underlying diversity jurisdiction would not support jurisdiction. Id. at 447. According to the court:

> Neither the plaintiff in this case, his mother, nor his grandparents is a stranger to Virginia. Plaintiff was born in Virginia and has spent all of his life in this Commonwealth except for a one-year stay in California. Plaintiff's mother considers herself a Virginian, and plaintiff's grandparents are Virginia citizens and were Virginia citizens at the time this suit was

> filed. Moreover, although plaintiff's mother was apparently awarded custody of plaintiff, it is clear that plaintiff's mother was not exercising control and did not have actual custody of the plaintiff at the time this suit was filed. The record clearly reflects the fact that plaintiff's grandparents were and had been acting in loco parentis in providing for plaintiff's support, maintenance, protection and guidance at the time this suit was filed. Plaintiff's grandparents made the important decisions affecting plaintiff's well-being without any reference to plaintiff's mother. Under these circumstances, the Court holds that the citizenship of the plaintiff for federal diversity jurisdiction purposes should be considered the same as the citizenship of plaintiff's grandparents.

Id.

The reasoning of Elliott was adopted and applied in Linville v. Price, 572 F. Supp. 345 (S.D. W. Va. 1983), where a minor who lived with an aunt and uncle who provided for virtually all of his needs was held to be domiciled in their state rather than the state of his parents, even though he had visited his parents at times and they had retained custody throughout. The plaintiff there spent most of his minority in West Virginia living with an aunt and uncle who were citizens of that state. Id. at 346. He was essentially in their custody and control and they provided for his support and maintenance. Id. All of his schooling was obtained in West Virginia, and he never lived in Michigan with his parents for any extended period of time and always returned to West Virginia. Id. He also did not change his domicile to Michigan after attaining his

majority. Id. Relying upon the reasoning of Elliott, the court concluded that the plaintiff's aunt and uncle were acting in loco parentis to him, and that the plaintiff's domicile for federal diversity jurisdiction purposes was that of the aunt and uncle. Id. at 348.

This Court believes the situation before it is sufficiently analogous to that of Elliott and Linville to support the application of their reasoning here. See Holyfield, 490 U.S. at 48 (permitting resort to common-law principles "to the extent that they are not inconsistent with the objectives of the congressional scheme"). In this case, the undisputed material facts establish that Kristy was born at the Indian Hospital and lived primarily on the reservation until July 1985, when the Wahnee family moved into low-income HUD housing in Mountain View, Oklahoma. Upon execution of the power of attorney on January 24, 1986, Kristy returned to the reservation and has resided with Blanche Wahnee on the reservation since at least that time. Although the language of the power of attorney does not purport permanently to relinquish Stuart and Rhonda Wahnee's parental rights, the record documents that Blanche Wahnee, not Kristy's parents, has at all relevant times had de facto custody and control over Kristy, made all material decisions with regard to Kristy, and provided for all of Kristy's support and maintenance. Blanche Wahnee, for all practical purposes, has stood in loco parentis to Kristy. Accordingly, the Court concludes that Kristy's domicile can be properly deemed that of Blanche Wahnee for jurisdictional purposes. See Elliott, 466 F. Supp. at 447; Linville, 572 F. Supp. at 348.

The Court further notes that this conclusion is consistent with the express purposes of the ICWA. In enacting the jurisdictional provisions of the ICWA, "Congress intended that as a general principal, Indian tribes should have authority to determine custody issues

involving Indian children." Halloway, 732 P.2d at 968. With respect to those resident on reservations, the tribe's jurisdiction is exclusive. 25 U.S.C. § 1911(a). However, even with respect to children that reside off the reservation, Congress mandated that state courts cede jurisdiction to tribal courts except where certain very stringent criteria were satisfied. 25 U.S.C. § 1911(b). Congress, in effect, used the domicile of the child as "a basis for distinguishing between those who maintain close ties with the tribe and, therefore, should be subject to its exclusive control and those who are sufficiently removed from the tribe and its ways to justify giving jurisdiction over them to non-Indian courts in certain circumstances." Halloway, 732 P.2d at 968. In this case, Kristy has certainly maintained close ties with the Tribe of which she is a member.

Furthermore, the Supreme Court in Holyfield recognized that an Indian tribe has a "protectable interest" in its Indian children that is distinct from but on a parity with the interest of the child's parents. According to the Court:

> The protection of this tribal interest is at the core of the ICWA, which recognizes that the tribe has an interest in the child which is distinct from but on a parity with the interest of the parents. This relationship between Indian tribes and Indian children domiciled on the reservation finds no parallel in other ethnic cultures found in the United States. It is a relationship that many non-Indians find difficult to understand and that non-Indian courts are slow to recognize. It is precisely in recognition of this relationship, however, that the ICWA designates the tribal court

> as the exclusive forum for the determination of custody and adoption matters for reservation-domiciled Indian children, and the preferred forum for nondomiciliary Indian children.

Holyfield, 490 at 52-53 (citing Holloway, 732 P. 2d at 969-70). The Court's conclusion today advances the interest of the Tribe in Kristy.

The Court therefore concludes that as Kristy was domiciled within the KCA reservation at all relevant times hereto, exclusive jurisdiction over custody matters relating to Kristy rests exclusively with the Tribal Court, not the State Court, as provided by 25 U.S.C. § 1911(a).

C.

As a further basis in support of its motion, the Tribe alleges that the Tribal Court has exclusive jurisdiction over Kristy's custody proceedings pursuant to 25 U.S.C. § 1911(a) because Kristy is a "ward" of the Tribal Court. The Tribe asserts that it is undisputed that Kristy was made a ward of the Tribal Court on June 26, 1987. Therefore, the Tribe argues, jurisdiction over Kristy rests exclusively with the Tribal Court under § 1911(a). Defendants and Rhonda Wahnee, in response, allege that the Tribal Court's order declaring Kristy a ward of the Tribal Court was void ab initio since Rhonda Wahnee objected to the transfer of the action at the May 27, 1987, hearing, as provided by 25 U.S.C. § 1911(b).

Section 1911(a) provides that once an Indian child becomes a "ward" of the tribal court, "the Indian tribe shall retain exclusive jurisdiction, notwithstanding the residence or domicile of the child." 25 U.S.C. § 1911(a) (emphasis supplied). Judicial interpretation of this provision has

established that "§ 1911(a) can pertain only to such wardship orders of the tribal court which are entered while the child is residing or domiciled on the reservation." In re Adoption of T.R.M. and J. Q., 525 N.E.2d 298, 306 (Ind. 1988), cert. denied, 490 U.S. 1069 (1989). This allows the tribal court to retain exclusive jurisdiction when the domicile or residence of the child has changed after the initial tribal court order of wardship. Id. Thus, the tribal court "could not be empowered to effectuate the status of a child as a 'ward of the court' relying upon § 1911(a) where the child was never domiciled on the reservation, and was not residing on the reservation at the time the tribal court exercised jurisdiction and entered the wardship order." Id.

The undisputed material facts of this case establish that the Tribal Court issued an order accepting jurisdiction and declaring Kristy a ward of the Tribal Court on June 26, 1987. The Court has already ruled that on that date, Kristy was both a resident and a domiciliary of the KCA reservation. Thus, pursuant to 25 U.S.C. § 1911(a), the Tribal Court had exclusive jurisdiction to issue the order, and exclusive jurisdiction over Kristy's custody proceedings is retained in the Tribal Court, without regard to Kristy's subsequent residence or domicile. See In re M.R.D.B., 787 P.2d 1219, 1223 (Mont. 1990) (finding exclusive jurisdiction pursuant to § 1911(a) because the Indian child was a ward of the tribal court).

Although defendants and Rhonda Wahnee maintain that the Tribal Court's order declaring Kristy a ward of the tribal court was void ab initio under 25 U.S.C. § 1911(b) due to Rhonda Wahnee's objection to the transfer of the case, the Court is compelled to disagree. Section 1911(b) , by its express terms, applies to proceedings where the Indian child in question is "not domiciled or residing within the reservation of the Indian

child's tribe." 25 U.S.C. § 1911(b). Section 1911(b) is, therefore, not applicable here. See In re M.R.D.B., 787 P.2d at 1223 (finding § 1911(b) inapplicable because the tribal court had exclusive jurisdiction because the Indian child was a ward of the tribal court). Pursuant to 25 U.S.C. § 1911(a) , jurisdiction over Kristy's case rests exclusively with the Tribal Court, not the State Court.

V.

As an additional matter, the Tribe alleges that pursuant to 25 U.S.C. § 1911(d), the State Court must give full faith and credit to the rulings of the Tribal Court that it has jurisdiction over Kristy's case. The Tribe states that on November 22, 1988, the Tribal Court specifically found that it had jurisdiction, and repeatedly recited its jurisdiction in subsequent decisions.[10] The Tribe maintains that those rulings are entitled to full faith and credit by the State Court; the State Court was bound to honor them when it sought to reassume jurisdiction over Kristy's case in 1991. The Tribe moves the Court to rule, as a matter of law, that the decisions of the Tribal Court declaring it to have jurisdiction are controlling.

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[10]The Tribe's initial brief requests the Court to declare that the State Court must give full faith and credit to the Tribal Court's November 22, 1988. order, wherein the Tribal Court specifically ruled that it had personal and subject matter jurisdiction over the action; however, subsequent briefing by the Tribe appears to request full faith and credit with regard to all of the subsequent rulings by the Tribal Court, including the February 5, 1992, order granting summary judgment in favor of the Tribe.

Defendants and Rhonda Wahnee respond that the State Court is not required to afford full faith and credit to the Tribal Court's determinations because the Tribal Court lacked jurisdiction to enter those rulings, as the transfer of the case to the Tribal Court was improper due to Rhonda Wahnee's objection to that transfer pursuant to 25 U.S.C. § 1911(b) . They thus argue that the Tribal Court's findings that it has jurisdiction over Kristy's custody proceedings are void.

. . .

As stated earlier, § 1911(d) requires that all courts in the United States give full faith and credit to the public acts, records, and judicial proceedings of an Indian tribe in custody proceedings to the same extent that full faith and credit is given to the public acts, records, and judicial proceedings of any other entity. 25 U.S.C. § 1911(d); see also Roman-Nose, 967 F.2d at 437 ("State courts must give full faith and credit to tribal court actions in custody proceedings."); Native Village of Stevens v. Smith, 770 F.2d 1486, 1488 (9th Cir. 1985) (federal court determined that a tribal counsel decision to remove a child from his home and place him under tribal custody must be given full faith and credit by the state under § 1911(d)), cert. denied, 475 U.S. 1121 (1986). Full faith and credit is required regardless of whether tribal jurisdiction is exclusive of or concurrent with state jurisdiction. Native Village of Venetie I.R.A. Council, 944 F.2d at 555; In re C.W., 479 N.W.2d 105 (Neb. 1992). Thus, if the Tribal Court has jurisdiction over Kristy's custody dispute, the State Court must give full faith and credit to the Tribal Court's decrees.[11]

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[11] Compare Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee, 456 U.S. 694, 702 n.9

Although Rhonda Wahnee alleges that the rulings of the Tribal Court are void because she objected to the June 11, 1987, transfer of the case, the Court finds to the contrary. The Court has already concluded that the Tribal Court, in fact, has exclusive jurisdiction over Kristy's custody dispute pursuant to 25 U.S.C. § 1911(a), since Kristy, at all relevant times, was a resident of the reservation, was a domiciliary of the reservation, and was a ward of the Tribal Court. Furthermore, the Court has found that Rhonda Wahnee's objection pursuant to 25 U.S.C. § 1911(b) does not mandate a contrary result, as §

(1982)("A party that has had an opportunity to litigate the question of subject-matter jurisdiction may not ... reopen that question in a collateral attack upon an adverse judgment."); Sherrer v. Sherrer, 334 U.S. 343 350 (1948)(footnote omitted)("Insofar as cases originating in the federal courts are concerned, the rule has evolved that the doctrine of res judicata applies to adjudications relating either to jurisdiction of the person or of the subject matter where such adjudications have been made in proceedings in which those questions were in issue and in which the parties were given full opportunity to litigate."); Stoll v. Gottlieb, 305 U.S. 165, 172 (1938)(footnote omitted)("We see no reason why a court, in the absence of an allegation of fraud in obtaining the judgment, should examine again the question whether the court making the earlier determination on an actual contest over jurisdiction between the parties, did have jurisdiction of the subject matter of the litigation."); United States v. Van Cauwenberghe, 934 F.2d 1048, 1059 (9th Cir. 1991)(noting that the general rule of finality of jurisdictional determinations is not without exceptions, i.e., federal preemption).

1911(b) is not applicable here because Kristy was both a resident and a domiciliary of the reservation. Therefore, all orders entered by the State Court subsequent to its transfer of the action to the Tribal Court are void for lack of jurisdiction. [12] See Holloway, 732 P.2d at 970 ("[The Indian child] was dómiciled on the reservation and was subject to the tribal court's exclusive jurisdiction under [§ 1911(a)] of the ICWA. Therefore, the Utah court lacked jurisdiction and its orders were void. Any further proceedings regarding [his] custody or adoption must be had in the Navajo courts."). The Tribal Court's determinations regarding Kristy are entitled to full faith and credit to the extent of those of any other entity.

VI.

Lastly, the Tribe alleges that the State Court lost any jurisdiction it may have had over Kristy's case in 1987,

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[12]Although exclusive jurisdiction over Kristy's custody dispute was vested in the Tribal Court at the initiation of Kristy's case, the Court does not contest that the State Court properly held jurisdiction to determine whether it had jurisdiction. A state court "has a right and a need to determine its own jurisdiction in Indian child [custody] cases brought before it, and a judge making such a determination clearly would be acting within the scope of his judicial capacity, regardless of the propriety of his ruling on the jurisdictional question." Navajo Nation v. District Court for Utah County, Fourth Judicial Dist., 624 F. Supp. 130, 134 (D. Utah 1985), later proceeding, In re Adoption of Holloway, 732 P.2d 962 (Utah 1986), aff'd, Navajo Nation v. District Court for Utah County, Fourth Judicial Dist., 831 F.2d 929 (10th Cir. 1987).

when it transferred the case to the State Court. The Tribe argues that the State Court ignored the black letter principle that courts have no jurisdiction to consider anything, including reconsideration of a transfer order, once a transfer has been granted and the record actually transmitted. The Tribe thus maintains that the State Court's reassertion of jurisdiction and declaration that the transfer order was void, almost four years after the transfer and assumption of jurisdiction by the Tribal Court, was meaningless.

Defendants and Rhonda Wahnee maintain that the original transfer of Kristy's case to the Tribal Court was void, as Rhonda Wahnee objected to that transfer in accordance with 25 U.S.C. § 1911(b). They therefore submit that when the State Court found the initial transfer improper, it could reassert jurisdiction to correct its error.

The Court addresses this issue as an alternative basis in support of the Court's conclusion that the State Court does not have jurisdiction over Kristy's case. Oklahoma recognizes the right of one court to transfer an action brought improperly in that court, to another court where the action should have been filed. See,e.g., Pribram v. Fouts, 736 P.2d 513, 515 (Okla.1987) (Oklahoma courts have a "common law power to transfer a case from one county where venue is improper to another county having proper venue in the interest of efficient administration of justice."). Further, the Oklahoma Supreme Court has stated that "[t]he court to which a case is transferred does not acquire jurisdiction until the papers and records are received, but thereafter has jurisdiction for all purposes." Gulf Oil Co. v. Woodson, 505 P.2d 484, 490 (Okla.

1972)(emphasis supplied) (citations omitted).[13]

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[13]Oklahoma's analysis of a transferee court's jurisdiction is consistent with the decisions of federal courts construing transfers made pursuant to 28 U.S.C. § 1404(a) in cases involving transfers made under the doctrine of forum non conveniens. The Tenth Circuit examined such transfers in Chrysler Credit Corp. v. Country Chrysler, Inc, 928 F.2d 1509 (10th Cir. 1991), and stated that "[o]nce the files in a case are transferred physically to the court in the transferee district, the transferor court loses all jurisdiction over the case, including the power to review the transfer." Id. at 1516-17 (footnote omitted). This loss of jurisdiction becomes effective when the papers in the transferred case are docked in the transferee court. Id. at 1517. This date also marks the termination of appellate jurisdiction in the transferor circuit. Id. Unless the district court has transferred the case without proper authority, or the transferee court lacks jurisdiction over the case, the transfer order is unreviewable by the transferor circuit as of that date. Id. See also Petersen v. Douglas County Bank & Trust Co., 940 F.2d 1389 (10th Cir. 1991) (applying Chrysler Credit); Robbins v. Pocket Beverage Co., 779 F.2d 351 (7th Cir. 1985)(district court retained jurisdiction to vacate its transfer order where motion for reconsideration was granted before files were received by transferee court); Lafayette Coal Co. v. Gilman Paper Co., 640 F. Supp. 1 (N.D. Ill. 1986) (federal court no longer had jurisdiction to reconsider its order transferring case to Georgia after complete file of record had been sent to clerk of court and receipt of record was acknowledged); Pendleton v. Armortec, Inc., 729 F. Supp. 495 (M.D. La. 1989) (federal court lost jurisdiction to reconsider transfer

Oklahoma law, likewise, recognizes that courts retain for a limited period plenary control over their terminal decisions. Schepp v. Hess, 770 P.2d 34, 37 (Okla. 1989). This power was historically invocable at any time during the term of court in which the judgment was rendered; the authority hence came to be known as "term-time". Id. at 36-37. Although terms of court have been abolished in Oklahoma, the common law term-time power survived and came to be codified at Okla. Stat. tit. 12, § 1031.1, and the time limit for invoking this ancient control is now fixed at thirty days from the decision; once timely invoked, the trial court's term-time power may be exercised after the thirty-day period. Okla. Stat. tit. 12, § 1301.1; Schepp, 770 P.2d at 37; Orthopedic Clinic v. Jennings, 481 P.2d 139, 140-41 (Okla. 1971).[14]

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order after record was transmitted to transferee district).

[14] Section 1031.1 in its present form provides in pertinent part:

> A. A court may correct, open, modify or vacate a judgment, decree or appealable order on its own initiative within thirty (30) days after the judgment, decree or appealable order. . . has been filed with the court clerk. Notice of the court's action shall be given as directed by the court to all affected parties.
>
> B. On motion of a party made within thirty (30) days after a judgment, decree or appealable order ... has been filed with the court clerk, the

In the case at bar, the State Court entered its transfer order on June 11, 1987, stating: "The Court Clerk of Kiowa County is hereby ordered and directed to transmit forthwith all files, pleadings, instruments and a certified copy of the docket sheets herein to [the Tribal Court] . . . . " The Tribal Court accepted jurisdiction on June 26, 1987, and, although the record does not denote the exact date that the actual record was received, it is evident that the record was docketed promptly. Thereafter, the Tribal Court assumed jurisdiction, made Kristy a ward of the Tribal Court and held several custody and related hearings at which it repeatedly recited that it had jurisdiction over both the subject matter and the parties, all without objection by Rhonda Wahnee.

The State Court's order vacating the June 11, 1987, transfer was not entered until February 11, 1991, almost four years after the 1987, transfer. In his order, Judge

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> court may correct, open, modify or vacate the judgment, decree or appealable order. Where the judgment, decree or appealable order states the matter was taken under advisement, the motion to correct, open, modify, or vacate the judgment, decree or appealable order, if made, must be filed within thirty (30) days from the date of mailing of a file-stamped copy of the judgment, decree or appealable order to the moving party. The moving party shall give notice to all affected parties.

Okla. Stat. tit. 12, § 1031.1.

Hovis ruled that the transfer order was void because "(w]here an objection is timely raised by a non-Indian parent, transfer cannot be made pursuant to 25 U.S.C. § 1911(b)." Not only was that ruling incorrect when applied here due to the inapplicability of § 1911(b),[15] but the State Court, at that time in 1991, had indeed lost jurisdiction to vacate the prior order. The record had already been transferred, and the Tribal Court had already asserted its exclusive jurisdiction. see Gulf Oil, 505 P.2d at 490. Assuming, arguendo, that the State Court sought to vacate the transfer order pursuant to Okla. Stat. tit. 12, § 1031.1 (and assuming that the order was a "judgment, decree or appealable order" that is subject to the statute), the State Court's assertion of jurisdiction upon Rhonda Wahnee's 1991, motion to vacate, almost four years later, was untimely. Thus, even § 1031.1 would not grant the State Court authority to vacate the transfer order under the circumstances of this case. C.f. Southeastern, Inc. v.

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[15]The Court does not dispute that a transfer pursuant to 25 U.S.C. § 1911(b) over an objection is error; rather, the Court rejects the application of § 1911(b) to this case. Under § 1911, as a whole, the State Court has power to transfer under certain predicate conditions. Assuming, arguendo, that the state judge at the time of transfer thought he was acting under § 1911(b), which is not at all clear from his transfer order, he had power to transfer. At worst, by failing to heed the significance of Rhonda Wahnee's objection to transfer, he committed error. Error is corrected by appeal. No one appealed, or sought a prohibitory writ. Error does not render an order void, but only voidable under prescribed procedures not followed here.

Doty, 481 P.2d 144 (Okla. 1971)(Where within thirty days after trial court had rendered judgment, motion requesting that such judgment be vacated was filed, assumption of jurisdiction on the same cause of action by trial court in another county did not divest first court of continuing jurisdiction.). In any event, the transfer of the case was correct in view of the exclusive jurisdiction vested in the Tribal Court pursuant to the ICWA. See 25 U.S.C. § 1911(a). The State Court had no jurisdiction to reconsider and vacate the transfer order, and its vacation of that order is void for lack of jurisdiction.

VII.

In conclusion, the Court is persuaded that the undisputed material facts of this case establish that exclusive jurisdiction over this matter rests with the Tribal Court, not the State Court, pursuant to 25 U.S.C. § 1911(a). The Court rules that the requirements of § 1911(a) are met in this case based on three findings, any of which would grant exclusive jurisdiction over Kristy's custody action to the Tribal Court: (1) Kristy at all times relevant hereto has resided within the reservation; (2) Kristy at all times relevant hereto has been domiciled within the reservation; and (3) Kristy is a ward of the Tribal Court. In addition, the State Court is required to give full faith and credit to the decrees of the Tribal Court, in accordance with 25 U.S.C. § 1911(d).

Alternatively, the Court rules that the State Court lacks jurisdiction over this matter on the basis that the State Court had no jurisdiction to reconsider and vacate its order transferring the case to the Tribal Court. The State Court's order vacating the transfer is void.

In view of the foregoing, summary judgment in favor of the Tribe is GRANTED. The State Court is directed

to abandon any further participation in this matter to the Tribal Court, consistent with this opinion.

It is so ordered this 25 day of March, 1994.

/s/ Wayne Alley
WAYNE E. ALLEY
United States District Judge

PNN0DCAE

§ 1911. Indian tribe jurisdiction over Indian child custody proceedings

(a) Exclusive jurisdiction

An Indian tribe shall have jurisdiction exclusive as to any State over any child custody proceeding involving an Indian child who resides or is domiciled within the reservation of such tribe, except where such jurisdiction is otherwise vested in the State by existing Federal law. Where an Indian child is a ward of a tribal court, the Indian tribe shall retain exclusive jurisdiction, notwithstanding the residence or domicile of the child.

(b) Transfer of proceedings; declination by tribal court

In any State court proceeding for the foster care placement of, or termination of parental rights to, an Indian child not domiciled or residing within the reservation of the Indian child's tribe, the court, in the absence of good cause to the contrary, shall transfer such proceeding to the jurisdiction of the tribe, absent objection by either parent, upon the petition of either parent or the Indian custodian or the Indian child's tribe: *Provided,* That such transfer shall be subject to declination by the tribal court of such tribe.

(c) State court proceedings; intervention

In any State court proceeding for the foster care placement of, or termination of parental rights to, an Indian child, the Indian custodian of the child and the Indian child's tribe shall have a right to intervene at any

point in the proceeding.

(d) Full faith and credit to public acts, records, and judicial proceedings of Indian tribes

The United States, every State, every territory or possession of the United States, and every Indian tribe shall give full faith and credit to the public acts, records, and judicial proceedings of any Indian tribe applicable to Indian child custody proceedings to the same extent that such entities give full faith and credit to the public acts, records, and judicial proceedings of any other entity.

APPENDIX F

IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF OKLAHOMA

COMANCHE INDIAN TRIBE OF OKLAHOMA, a federally recognized Indian tribe,	NO. CIV-92-2134A
Plaintiff,	**COMPLAINT**
vs.	(Declaratory and Injunctive Relief)
THE HONORABLE RICHARD E. HOVIS, individually and as Judge of the District Court of Kiowa County, Oklahoma; THE DISTRICT COURT OF KIOWA COUNTY, OKLAHOMA,	
Defendants.	

Plaintiff, the Comanche Indian Tribe of Oklahoma (hereinafter referred to as "Plaintiff" or "Tribe") hereby alleges as and for its complaint, as follows:

I.

Plaintiff, Comanche Indian Tribe, is a sovereign Indian tribe, duly recognized by the United States government, which exercises governmental authority over certain tribal trust lands located near Lawton, Oklahoma. Plaintiff operates pursuant to the Constitution of the Comanche Indian Tribe, approved by the Secretary of the Interior and Commissioner of Indian Affairs, on January 9, 1967. Plaintiff has established the Children's

Court of the Comanche Tribe which is an Indian tribal court and which has jurisdiction over child custody proceedings on Comanche tribal lands. The Children's Court for the Comanche Indian Tribe is hereafter referred to as "Comanche Tribal Children's Court".

II.

Defendant, the Hon. Richard E. Hovis, Judge of the District Court of Kiowa County, State of Oklahoma, is a judge within the Kiowa County District Court and, upon information and belief, resides in Oklahoma. The District Court of Kiowa County, Oklahoma is a duly authorized district court of the State of Oklahoma (hereinafter "State Court").

III.

This is an action for declaratory judgment, pursuant to Title 28 U.S.C. §2201, for the purpose of determining a question of actual controversy between the parties as hereinafter more fully appears. There is now existing between the parties involved in this proceeding, an actual, justiciable controversy in which Plaintiff is entitled to have a declaration of its rights, and further relief, including a mandatory injunction, due to the facts, conditions and circumstances as set forth in this Complaint.

IV.

Jurisdiction of this action is based on Title 28 U.S.C. §§ 1331 (federal question) and 1362 (Indian tribe federal question). Further, jurisdiction is based on Title 25 U.S.C. §§ 1901 and 1911(d), the Indian Child Welfare Act. Venue is proper under 28 U.S.C. §1391(b).

V.

The underlying matters which give rise to this cause of action must be explained in order for this Court to understand the controversy. This case concerns a proceeding to determine the placement and ultimate

custody of Kristy Wahnee, a minor child and an enrolled member of the Comanche Tribe, (hereinafter referred to as "Kristy").

VI.

Kristy is the natural, legitimate daughter of Stuart Wahnee (hereinafter "Stuart"), an enrolled member of the Comanche Tribe, and Rhonda (Greenough) Wahnee, a non-Indian.

VII.

Kristy was born on July 19, 1982, at the Indian Hospital in Lawton, Oklahoma.

VIII.

In the summer of 1983, the Wahnee family moved from Oklahoma City to Comanche tribal lands.

IX.

On April 19, 1984, Kristy's brother, Shannon James Wahnee, was born at the Indian Hospital in Lawton, Oklahoma.

X.

The next year, both children were hospitalized and diagnosed as having hemolytic uremic syndrome.

XI.

Following the hospitalization, the Wahnees moved off Comanche tribal lands so they could be closer to the hospital because of the precarious health of the children.

XII.

In October, 1985, Kristy was sent by both parents to live with her paternal aunt, Blanche Wahnee, (hereinafter referred to as "Blanche"), an enrolled member of the Comanche Tribe, and a domiciliary of Comanche tribal lands.

. . .

. . .

XIII.

On October 8, 1985, Stuart was court ordered to leave the home pursuant to a protective order and Rhonda filed for a divorce on October 15, 1985.

XIV.

On January 24, 1986, Stuart and Rhonda granted a Power of Attorney to Blanche on behalf of Kristy, authorizing Blanche to keep Kristy in her custody and to make decisions for Kristy, recognizing that Kristy was living with Blanche. Both parents signed the Power of Attorney. See Exhibit "1" attached and incorporated by this reference. Upon information and belief, this Power of Attorney has never been revoked.

XV.

On or about April 28, 1986, Shannon Wahnee was taken by police to the Indian Hospital, because he had been seriously beaten while in his mother's home. He further had been burned, including cigarette burns on his penis.

XVI.

On May 2, 1986, the Comanche Tribal Children's Court assumed jurisdiction over Shannon and granted temporary custody of Shannon to his paternal grandmother, Maggie Wahnee. No party objected to the Comanche Tribal Children's Court's jurisdiction.

XVII.

On May 16, 1986, at the request of Stuart, the assistant district attorney for Kiowa County, Oklahoma, filed a petition in Kiowa County District Court requesting that the state court determine that Shannon was a deprived child and that Rhonda's parental rights be terminated. As a matter of standard procedure, the petition included Kristy as well, even though at the time Kristy was living with her paternal aunt, Blanche, a domiciliary of Comanche tribal lands.

XVIII.

On May 27, 1987, the Kiowa County District Court noted that the Comanche Tribal Children's Court sought to assume jurisdiction under the Indian Child Welfare Act (ICWA). The Court granted the transfer and dismissed the action in that Court.

XIX.

At that hearing, and only after the Judge announced his decision, Rhonda Wahnee, for the first time, through her attorney, made an oral objection to the transfer.

XX.

On June 11, 1987, the Kiowa County District Court signed the Order transferring the matter to the Comanche Tribal Children's Court.

XXI.

The Comanche Tribal Children's Court then assumed jurisdiction and made Kristy a ward of the Comanche Tribal Children's Court, and consolidated the two children's cases, now styled: In the Interest of Kristy Ann Wahnee; DOB 7/19/82, a minor Comanche child.

XXII.

Beginning September 4, 1987, and continuing through August of 1990, the Tribal Court conducted several hearings, the majority of which were attended by all parties, including Rhonda. At no time did Rhonda object to the Comanche Tribal Children's Court's jurisdiction, once the case had been transferred.

XXIII.

On June 5, 1990, Shannon, who was then living with Kristy and Blanche, died of a cerebral hemorrhage. Upon information and belief, the death was caused by abuse previously suffered by the child.

. . .

. . .

XXIV.

In February, 1991, Rhonda asked the Kiowa County District Court to void its June 11, 1987, order transferring the case to the Comanche Tribal Children's Court. The basis for the request was that once Rhonda had objected, the case could not be transferred, pursuant to Title 25 U.S.C. §1911(b), §101(b) of the ICWA. This was heard by Defendant Hovis.

XXV.

Pursuant to the order of defendant Hovis, defendant State Court declared that its transfer to the Comanche Tribal Children's Court was void ab initio.

XXVI.

The Tribe submitted a second motion to transfer on February 27, 1991, pursuant to §101(a) of the ICWA, 25 U.S.C. §1911(a) on the basis that Kristy resided on Comanche tribal lands, was a domiciliary of Comanche tribal lands and was a ward of the tribe, and therefore, the Comanche Tribal Children's Court had exclusive jurisdiction and the State Court had no jurisdiction.

XXVII.

This motion to transfer was denied by the State Court and Defendant Hovis entered summary judgment on behalf of Rhonda on June 5, 1991, declaring that the State Court had jurisdiction over the matter.

XXVIII.

Blanche appealed the decision of defendant Hovis to the Supreme Court of the State of Oklahoma, pursuant to an application to assume original jurisdiction. That application was denied by the Supreme Court of the State of Oklahoma on Tuesday, September 24, 1991.

XXIX.

The Plaintiff Tribe then filed a motion to intervene and a motion for summary judgment in the Comanche Tribal Children's Court asking the Comanche

Tribal Children's Court to affirm its decision that it had exclusive jurisdiction over this matter. Rhonda never filed a response to either motion, despite repeated notice.

XXX.

The Comanche Tribal Children's Court entered its Order on February 5, 1992, which is attached and incorporated as Exhibit "2" finding that it had exclusive jurisdiction pursuant to 25 U.S.C. §1911(a), which provides the Comanche Tribal Children's Court exclusive jurisdiction in three circumstances: (1) when the Indian child is domiciled on tribal trust land; (2) when the Indian child resides on tribal trust land; and/or (3) when the Indian child is a ward of the Tribal Court. The Comanche Children's Tribal Court determined that all three circumstances existed in the case of Kristy for the following reasons:

A. She had been living with her paternal aunt, an enrolled member of the Comanche Tribe and a domiciliary of Comanche tribal lands since October, 1985. Blanche has served as Kristy's guardian since that time. Kristy has received no support from her mother since she moved in with her aunt. Further, both of Kristy's parents signed a Power of Attorney to Blanche, authorizing Blanche to have complete control over and custody of Kristy.

B. Blanche is a domiciliary of Comanche tribal lands and, therefore, Kristy's domicile should be that of Blanche, that being the Comanche lands.

C. Kristy resides on Comanche tribal lands and, therefore, Kristy's residence is on Comanche lands.

D. The Comanche Tribal Children's Court has made Kristy a ward of the Tribal Court.

E. Kristy's father, Stuart, is an enrolled member of the Tribe.

F. The State action initiated to void the transfer, if appropriate, should have been filed as a matter of proper procedure with the Comanche Tribal Children's Court which had already assumed jurisdiction pursuant to inherent authority and in accordance with the State transfer order and, because the State Court refused to comply with this procedure, any orders of the State Court would be void.

XXXI.

Defendants Hovis and State Court have taken the position that 25 U.S.C. §1911(a) is not applicable and that jurisdiction must be determined pursuant to 25 U.S.C. §1911(b). Because Rhonda voiced an oral objection to the transfer, defendant Hovis has taken the position that the State has exclusive jurisdiction over any custody issues with regard to Kristy.

XXXII.

On or about the 11th day of July, 1992, the Comanche Business Committee by virtue of the Tribe's Constitution, Article VI, Section 7(j), passed a resolution asserting the tribe's jurisdiction in the Kristy Wahnee child custody case and holding that the Tribe did not relinquish any jurisdiction to the State of Oklahoma. Title 25 U.S.C. §1911(d) requires this Court to enforce this resolution.

XXXIII.

Title 25 U.S.C. §1901 provides that there is no resource more essential to the continued existence and integrity of Indian tribes than their children and that the United States has a direct interest, as trustee, in protecting Indian children who are members of or are eligible for membership in an Indian tribe.

COUNT ONE

(Declaratory Judgment and Injunction)

XXXIV.

Plaintiffs reallege and incorporate by

reference all of the allegations contained in Paragraphs I-XXXIII herein.

XXXV.

Both Plaintiff and Defendants are now claiming exclusive jurisdiction over the matter of Kristy Wahnee. Plaintiff and Defendants are in disagreement as to which section of 25 U.S.C. §1911 applies to determine jurisdiction in this matter. Defendant Hovis refuses to give full faith and credit to the decision of the Comanche Tribal Children's Court which he is required to do pursuant to 25 U.S.C. §1911(d). A determination needs to be made as to which court has the exclusive jurisdiction to hear matters with regard to Kristy. The determination of who has jurisdiction is an actual controversy within the jurisdiction of this Court. Declaratory and injunctive relief will effectively adjudicate the rights of the parties.

WHEREFORE, Plaintiff requests this Court to:

1. Enter a Declaratory Judgment that the Comanche Tribal Children's Court has exclusive jurisdiction over all issues with respect to Kristy, pursuant to 25 U.S.C. §1911(a).

2. Restrain Defendants, their officers, employees and courts from taking further action in this case, other than to transfer the case to the Comanche Tribal Children's Court, and order that any prior orders of Defendants with regard to Kristy (other than an order of transfer) be deemed void.

3. Pending final hearing and determination of the Court of this matter, a preliminary injunction be issued restraining the Defendants from the enforcement of any of their orders and entering a stay of any existing orders.

4. Issue such other and further relief as

it may deem necessary and proper in the circumstances.

COUNT TWO

(Declaratory Judgment and Injunction)

If this Court does not award the Comanche Tribal Children's Court exclusive jurisdiction, then Plaintiff pleads in the alternative as follows:

XXXVI.

Plaintiffs incorporate and reallege the allegations contained in paragraphs I - XXXV as if fully set forth herein.

XXXVII.

Blanche owns a home on Comanche tribal lands and is a domiciliary of Comanche tribal lands. However, Blanche teaches in Lawrence, Kansas, and, therefore, resides in Lawrence, Kansas for nine months of each school year. When Blanche resides in Lawrence, Kansas, Kristy resides with her in Lawrence, Kansas.

XXXVIII.

In the defendant State Court, Blanche and other parties filed an action to transfer the matter to the District Court of Douglas County, Kansas based upon the fact that Kristy resides there for nine months of each year and therefore, that court has exclusive jurisdiction as the child's place of residence and, moreover, has more direct contact with the parties and with regard to the child custody issues involved in this case than does the District Court of Kiowa County, Oklahoma.

XXXIX.

Upon information and belief, Defendant Hovis takes the position that Kristy does not reside on Comanche tribal lands because the majority of the time she resides in Lawrence, Kansas.

XL.

Despite the motions of the parties,

Defendant Hovis transferred the matter to another county in Oklahoma, Logan County. Logan County has refused to accept the case and the case, therefore, is back before defendant Hovis.

XLI.

If this Court determines that Kristy resides in Lawrence, Kansas, then child custody jurisdiction should be deemed to be in Kansas, not Oklahoma, pursuant to the Uniform Child Custody Jurisdiction Act, the Parental Kidnapping Prevention Act (Title 28 U.S.C. §1738A) and, moreover, pursuant to the Oklahoma Child Custody Jurisdiction Act (10 Okla. St. Ann. §§1601-1628) and the Kansas Child Custody Jurisdiction Act (K.S.A. 38-1301 to 38-1326), which all look to the child's "home state" as and for determining which state has jurisdiction over a child custody matter. "Home state" is the state in which the child immediately preceding the time involved lived with his parents or a person acting as a parent for at least six consecutive months. Title 28 U.S.C. §1738A(b)(4). Title 28 U.S.C. §1738A preempts state law with regard to determining jurisdiction and therefore, this Court has jurisdiction to declare which state court, if not the tribal court, has jurisdiction. This constitutes a justiciable controversy.

WHEREFORE, in the alternative, Plaintiff requests this Court to:

1. Enter a Declaratory Judgment that the District Court of Kiowa County does not have jurisdiction over this matter.

2. Enter an Order of Declaratory Judgment directing Defendant Hovis to transfer this matter to the District Court of Douglas County, Kansas for further action.

. . .

. . .

3. Enjoin Defendants from any further action in this matter other than to order the transfer of the matter to the District Court in Kansas.

DATED THIS ____ day of October, 1992.

O'CONNOR, CAVANAGH, ANDERSON, WESTOVER, KILLINGSWORTH & BESHEARS, P.A.

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Supreme Court, U.S.
FILED
SEP 18 1995
CLERK

No. 95-295

In The
Supreme Court of the United States
October Term, 1995

COMANCHE INDIAN TRIBE OF OKLAHOMA, (Plaintiffs)
Petitioners,

v.

THE HONORABLE RICHARD E. HOVIS, THE DISTRICT COURT OF KIOWA COUNTY, OKLAHOMA, (Defendants) and **RHONDA WAHNEE** (Intervenor),
Respondents.

On Petition for A Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

RESPONDENTS' JOINT BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does the statutorily enacted term "court of competent jurisdiction" found in **§1914** of the *Indian Child Welfare Act*, **25 U.S.C. §1901**, *et seq.*, ("ICWA") create "appellate" jurisdiction in the Federal district court over State court juvenile proceedings involving an Indian child, or otherwise repeal or bypass provisions of **28 U.S.C. §1738** which requires federal courts to give "full faith and credit" to final State court determinations?

2. Did the Comanche Tribe's additional claims in **Count II** of its original *Complaint* under the *Oklahoma Child Custody Jurisdiction Act*, **43 Okla. Stat. §501**, *et seq.* ("Okla. UCCJA"), the *Kansas Uniform Child Custody Jurisdiction Act*, **Kan. Stat. Ann. §38-1301** to **§38-1326** ("Kan UCCJA") as well as the *Parental Kidnapping Prevention Act*, **28 U.S.C. §1738A** (PKPA) permit an award of attorneys fees and costs to Respondent Rhonda Wahnee when these statutory enactments contain provisions for and "encourage" awards of attorneys fees to prevailing parties in "appropriate" cases regarding child custody jurisdictional disputes?

LIST OF PARTIES

The parties to this proceeding on *Petition for Writ of Certiorari* are:

Petitioner:

Plaintiffs in the Federal District Court and Appellants in the United States Court of Appeals for the Tenth Circuit (Intervenors in the Kiowa County District Court of the State of Oklahoma and the Comanche Tribal Children's Court):

THE COMANCHE TRIBE OF OKLAHOMA.

Respondents:

Defendants in the Federal District Court, Appellants in the United States Court of Appeals for the Tenth Circuit and Respondents in this proceeding:

RICHARD E. HOVIS, Associate District Judge of the District Court of Kiowa County and THE DISTRICT COURT OF KIOWA COUNTY.

Intervenor in the Federal District Court, Appellant in the United State Court of Appeals for the Tenth Circuit and Respondent in this proceeding (Respondent in the Kiowa County District Court of the State of Oklahoma and the Comanche Tribal Children's Court):

RHONDA WAHNEE.

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No. 95-295

In The

Supreme Court of the United States

October Term, 1995

COMANCHE INDIAN TRIBE OF OKLAHOMA, (Plaintiffs)
Petitioners,

v.

THE HONORABLE RICHARD E. HOVIS, THE DISTRICT COURT OF KIOWA COUNTY, OKLAHOMA, (Defendants) and **RHONDA WAHNEE** (Intervenor),
Respondents.

RESPONDENTS' JOINT BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

PRELIMINARY STATEMENT

THE HONORABLE RICHARD E. HOVIS, THE DISTRICT COURT OF KIOWA COUNTY, OKLAHOMA and RHONDA WAHNEE,[1] Respondents, come before this

[1]All Respondents submit this single joint Brief in opposition of the *Petition for Writ of Certiorari* filed by the Comanche Tribe. Respondents have associated, yet distinct and separate interests on appeal.

Respondents HOVIS and THE DISTRICT COURT (Defendants-Appellants in the Federal district court) resist the federal court's judgment to protect its jurisdiction and the finality of its judgments.

(continued...)

Court and respectfully request that this Court deny the *Petition for Writ of Certiorari* which seeks review of the Tenth Circuit's opinion. That opinion is reported as *Comanche Indian Tribe of Oklahoma v. Hovis*, 53 F.3d 298 (10th Cir., April 18, 1995), 63 U.S.L.W. 2383 and is reprinted in the *Petition* at **Appendix A**. The Federal District Court decision is reported as *Comanche Indian Tribe of Oklahoma v. Hovis*, 847 F.Supp. 871 (USDC WD Okla., March 28, 1994) and is reprinted in the *Petition for Certiorari* at **Appendix D.**

This case, as decided by the Tenth Circuit, is a straightforward application of the rules of "full faith and credit" and "collateral estoppel." There is no need to accept the Tribe's invitation to strike out on a judicial cross-country across new territory whose result would cut a swath of new rules altering the important and essential requirements of "full faith and credit" by unnecessary relitigation of state court judgments.

As such, this case falls wide of the requirements of this Court's **Rule 10.1**, because, although this Court has never addressed the exact issues raised by Petitioner's claim, the exact question decided by the Tenth Circuit is not in critical division in the Circuit courts, nor is there any serious departure from

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[1](...continued)

Intervenor RHONDA WAHNEE (Intervenor-Appellant in the Federal district court proceedings) seeks protection of her right to object to an illegal and inappropriate transfer from the State District Court to the Tribal Court as well as the denial of her right of due process in the original state court proceeding and the subsequent tribal court proceedings.

However, as a result of the submission of a joint brief, critical comments regarding the positions of the litigants, the Comanche Tribe or Comanche Tribal Court procedures should not be referenced to Respondent HOVIS, but instead should be considered as attributable only to Respondent WAHNEE.

accepted principles that requires the superintending force of this Court.[2]

Stated another way, if the Comanche Tribe's theory is correct, the mere recitation of the term, "court of competent jurisdiction" found in **25 U.S.C. §1914** is a grant of "appellate" jurisdiction to Federal district courts over final state court decisions simply because those proceedings involve Indian children. There is no indication Congress intended such a grant of jurisdiction in the *Indian Child Welfare Act*, **25 U.S.C. §1901**, *et seq.* ("ICWA").

Instead, the more logical consideration is that the authority Congress gave to the Indian tribes and others in **§1914** to ". . . petition any court of competent jurisdiction to invalidate such action upon a showing that such action violated any provision of section 1911, 1912 and 1913" meant that a "court of competent jurisdiction" is the appropriate appellate court of the state. The only Federal court that has direct appellate status of

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[2]Other federal litigation that has addressed the question of a collateral attack of a State court determination of its jurisdiction have reached results consistent with this case. See *Kickapoo Tribe of Oklahoma v. Rader*, 822 F.2d 1493, 1501 (10th Cir., 1987)(Tribe's federal suit challenging adoption under *Indian Child Welfare Act* (ICWA) barred under Oklahoma doctrine of res judicata); *Confederated Tribes of Colville Reservation v. Superior Court of Okanogan County*, 945 F.2d 1138, 1141 (9th Cir., 1990)(Federal court did not have jurisdiction over declaratory judgment action brought by tribe against state court to determine jurisdiction over custody dispute involving parents who were not represented in the declaratory judgment action where the declaratory judgment sought by the tribe was a de facto horizontal appeal from the state trial court); *Navajo Nation v. District Court for Utah County*, 831 F.2d 929, 930-1 (10th Cir., 1987)(Determination of issue of jurisdiction by State Supreme Court mooted collateral federal suit for declaratory judgment). However, Federal courts can have jurisdiction to address questions arising under the ICWA. See Footnote 16.

state court proceedings is this Court, by way of the federal statute granting this Court jurisdiction to review "final judgments or decrees rendered by the highest court of a state in which a decision could be had." **28 U.S.C. §1257** The Tribe gave the Supreme Court of the State of Oklahoma no opportunity to correct the "error", if any, of the lower court.

While the Petitioner Tribe now comes before this Court alleging injury to its sovereignty because the Respondent State Court vacated its original order of transfer, the Tribe failed to emphasize that the juvenile proceedings resided in the Kiowa County District Court for over a year before the Comanche Tribe sought transfer to its Tribal Children's Court. During that time, the State Court adjudicated its own jurisdiction and found that Kristy Wahnee and Rhonda, her mother, were properly before that Court because they were residents of Kiowa County.[3] As such, the State District Court at least had concurrent jurisdiction under **25 U.S.C. §1911(b)**. When the Tribe first sought a transfer, Rhonda indicated her objection to any such transfer.[4] Under **§1911(b)**, the case would have stayed in the State Court. Instead, the Tribe came to the district court and procured a *ex parte* order of transfer to Tribal

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[3]The original *Juvenile Petition* filed on May 6, 1986 recited that Kristy resided in Mountain View, Oklahoma. (See **Appendix A**) This matter was adjudicated as true and the State Court determined it had jurisdiction on June 16, 1986. (See **Appendix B**)

However, both the Tribal Court and the Federal District Court each subsequently "re-determined" Kristy was a resident on Indian land and that jurisdiction was exclusive in the Tribal Court under **25 U.S.C. §1911(a)**.

[4]Rhonda's oral objection in the State District Court opposing the suggestion that the case transfer to Tribal Court is memorialized on the judgment roll by *Court Minute* dated May 27, 1987. (See **Appendix C**)

Court without notice to Rhonda or a hearing.[5] As such, the transfer order was void *ab initio*. After Rhonda filed a *Motion to Vacate*, the State District Court retrieved its jurisdiction. The Tribal Court's and the Federal District Court's later determinations of jurisdiction pursuant to **§1911(a)** were contrary to the prior ruling of the State Court.

Finally, the Tenth Circuit properly awarded attorneys fees and costs to Respondent Rhonda Wahnee. Contrary to the Tribe's suggestion that the award of fees was in violation of the "American Rule," **there was** a statutory basis for fees. An examination of the argument advanced by Rhonda in her application for fees and costs makes it clear that the award of fees was sought pursuant to Oklahoma and Kansas law under their respective *Uniform Child Custody Jurisdiction Acts*, both of which were invoked as claims by the Comanche Tribe in **Count Two** of its original *Complaint* (See *Petition*, p. F-11) Each of these State statutory provisions provide for attorneys fees to prevailing parties in "appropriate cases."

The Tribe also invoked a claim under the Federal *Parental Kidnapping Protection Act*, **28 U.S.C. §1738A** ("PKPA") in **Count Two**. The PKPA does not provide an independent grant of federal jurisdiction. There is an uncodified statutory section enacted as a part of the PKPA in which Congress encouraged the award of attorneys fees in proceedings where prior court jurisdictional decisions are unnecessarily relitigated in a different forum. This is a situation directly applicable to the instant case.

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[5]The *Motion to Transfer* was filed on June 9, 1987. The Tribe obtained an *ex parte Order to Transfer* on June 11, 1987. These are reproduced as **Appendices D** and **E**) There is nothing on the face of the judgment roll that reflects that any notice was issued nor any hearing set to formally adjudicate the Tribe's transfer request.

QUESTIONS PRESENTED

1. Does the statutorily enacted term "court of competent jurisdiction" found in **§1914** of the *Indian Child Welfare Act*, **25 U.S.C. §1901**, *et seq.*, ("ICWA") create "appellate" jurisdiction in the Federal District Court over State court juvenile proceedings involving an Indian child, or otherwise repeal or bypass provisions of **28 U.S.C. §1738** which requires federal courts to give "full faith and credit" to final State court determinations?

2. Did the Comanche Tribe's additional claims in **Count II** of its original *Complaint* under the *Oklahoma Child Custody Jurisdiction Act*, **43 Okla. Stat. §501**, *et seq.* ("Okla. UCCJA"), the *Kansas Uniform Child Custody Jurisdiction Act*, **Kan. Stat. Ann. §38-1301** to **§38-1326** ("Kan UCCJA") as well as the *Parental Kidnapping Prevention Act*, **28 U.S.C. §1738A** (PKPA) permit an award of attorneys fees and costs to Respondent Rhonda Wahnee when these statutory enactments contain provisions for and "encourage" awards of attorneys fees to prevailing parties in "appropriate" cases regarding child custody jurisdictional disputes?

STATUTORY PROVISIONS

Oklahoma Child Custody Jurisdiction Act, **43 Okla. Stat. §501**, *et seq.* (Okla. UCCJA)

43 Okla. Stat. §509(G):[6]

> (G) If it appears to the court that it is clearly an inappropriate forum it may require the party who commenced the proceedings to pay, in addition to the costs of the proceedings in this state, necessary travel and other expenses, including attorneys' fees, incurred by other parties or their witnesses. Payment is to be made to the clerk of the court for remittance to the proper party.

Kansas Uniform Child Custody Jurisdiction Act, **Kan. Stat. Ann. §38-1301** *et seq.* (Kan. UCCJA).

Kans Stat. Ann. §38-1307(G):

> This statutory provision is identical to **43 Okla. Stat. §509(G)**.

Parental Kidnapping Prevention Act, Title **28 U.S.C. §1738A**[7]

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[6]This was renumbered from **10 Okla. Stat. §1609**. The Comanche Tribe recited **10 Okla. St. Ann. §1601-1628** as the Okla UCCJA in its *Complaint*. However, the Okla UCCJA was renumbered in September of 1990, over two years prior to the filing of Plaintiff's *Complaint*.

[7]The full text of **§1738A** is set out in **Appendix H**.

The following is an uncodified statute identified as **Section 8(c)** of **Pub.L. 96-611** and associated with **§1738A**:

> In furtherance of the purposes of **§1738A** of title **28**, United States Code [this section], as added by subsection (a) of this section, State courts are encouraged to--
>
> (1) afford priority to proceedings for custody determinations; and
>
> (2) award to the person entitled to custody or visitation pursuant to a custody determination which is consistent with the provisions of such **§1738A** [this section], necessary travel expenses, attorneys' fees, costs of private investigations, witness fees or expenses, and other expenses incurred in connection with such custody determination in any case in which--
>
> (A) a contestant has, without the consent of the person entitled to custody or visitation pursuant to a custody determination which is consistent with the provisions of such **§1738A** [this section], (i) wrongfully removed the child from the physical custody of such person, or (ii) wrongfully retained the child after a visit or other temporary relinquishment of physical custody; or
>
> (B) the court determines it is appropriate.

COUNTER-STATEMENT OF THE CASE

Respondents do not agree that the statement of the case presented by the Tribe is an accurate and complete identification of the necessary factual predicates to this case.

The Tenth Circuit's recitation of facts is an reliable statement of those facts necessary to its decision. However, because the fee application came postjudgment, that recitation is lacking of some the extraordinary actions of the Tribe to hinder Rhonda's efforts to obtain a return of Kristy which made this an "appropriate" case for an award of fees.

These factual predicates were more fully developed in the proceedings before the Tenth Circuit and have been briefly alluded to, in part, in the *Preliminary Statement*.

Rhonda contends the record clearly details numerous instances of the Tribe's efforts to prevent the return of Kristy to her or to even obtain occasional visitation. Although not entirely relevant to the argument in this Court, besides obtaining the *ex parte* order of transfer, refusing to conclude adjudication of the proceeding long after Rhonda left the abusive boyfriend who originally caused injury to Shannon,[8] and acted to shut down the Tribal Court as a means of preventing continued hearings on the restoration of Rhonda's custody[9], the Tribal Court continued to make findings that

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[8]As the Tenth Circuit noted in Footnote 3 of its opinion, the Tribe failed conclude a final adjudication of Rhonda's parental rights after several hearings over three and one-half years and indefinitely continued all court cases on its own motion. (*Petition*, **Append.**, p. A-4)

[9]The Tribal Court considered a trial placement of Kristy with Rhonda to which Blanche objected. The Tribal Court then reversed itself and eventually shut down its operation after Blanche met with Tribal Business Committee. (See **Appendix G**)

efforts to reunite the family "have failed" even after it agreed to a trial placement of Kristy with Rhonda and despite Rhonda's compliance with the Service Plan. More astonishingly, the Tribal Court referenced on several occasions in its journal entries, a speech impediment of Rhonda's that caused her to stutter. There was no explanation by the Tribal Court of the relationship of the impediment to Rhonda's fitness to parent her child.

Finally, the appropriateness of the fee award was also justified by the Tribe's refusal to acknowledge longstanding precedent within the Tenth Circuit decided adversely to the Tribe's position in its *Complaint*. See *Kiowa Tribe of Oklahoma v. Lewis*, 777 F.2d 587 (10th Cir., 1985) *cert. den.* 479 U.S. 872, 93 L.Ed.2d 171, 107 S.Ct. 247 (1986) The Comanche Tribe was on notice of such precedent since the official reporter shows the Tribe participated as *amicus curiae* before the Tenth Circuit. Despite this prior knowledge, there was no action by the Tribe to recognize this existing precedent or advance any good faith argument for its reversal in its original *Complaint*.

REASONS FOR DENIAL OF THE WRIT

I. THE TENTH CIRCUIT CORRECTLY RULED THAT A FEDERAL DISTRICT COURT MUST GIVE FULL FAITH AND CREDIT TO A STATE COURT'S PRIOR DETERMINATIONS OF ITS OWN JURISDICTION AND MAY NOT SIT IN "APPELLATE" REVIEW OF THOSE RULINGS.

The Tenth Circuit never reached the question of whether a federal court is a "court of competent jurisdiction" to

determine the appropriate jurisdiction for custody proceedings involving an Indian child.[10] Instead, the panel focused on whether the federal court was required to give "full faith and credit" to the those determinations of jurisdiction in the State Court.

In Part II of its opinion, the Tenth Circuit began by considering its own jurisdiction, as any Federal court must do[11] It concluded that the obligation of a Federal court to grant full faith and credit precluded redetermination of the State court's jurisdiction. It applied the rules of collateral estoppel of Oklahoma, as it is obligated to do under **28 U.S.C. §1738**. The Court found an identity between the parties and the issues and this conclusively precluded relitigation in Federal court. The Tribe did not appeal the final decision.[12]

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[10] See *Comanche Tribe v. Hovis*, (*Petition*, p. A-14-15):

> The question before us is not whether the federal district court is a "court of competent jurisdiction." Rather the question is whether the Tribe can institute an action in federal district court after it has lost in state court following full consideration, briefing, and argument on the identical issue of fact and law relating to jurisdiction to terminate parental rights.

[11]The Comanche Tribe incorrectly transcribed the opinion of the Tenth Circuit in **Appendix A** of the *Petition*. The heading "**Part II**" is omitted on Page A-10 from where it appears in the original *Memorandum Opinion*. (This can be shown by comparison to the original slip opinion reproduced at 1995 WL 229575 *4 or 53 F.3d at 302) Additionally, **Footnote 6** is misplaced from its location in the original opinion under **Part II** and its text is erroneously duplicated in the body of the text of the opinion as well as in the footnote incorrectly placed at the end of that duplicated text.

[12]An appeal was taken to the Oklahoma Supreme Court by Blanche and that Application to Assume Original Jurisdiction was denied. See **Appendix F**. (Excerpt of Order of Oklahoma Supreme Court dated September 24, 1991)

But the Comanche Tribe would not hold this so. Its theory is that they may intervene in a State court proceeding, litigate until they are dissatisfied with that result, abandon the normal state court appellate procedures implicit in a result with which they disagree and go elsewhere for a review of the State Court determination because the Federal district court is entitled to "referee" that previously decided determination.

Contrary to any assertion of the Comanche Tribe, there is no suggestion in the *Indian Child Welfare Act* that the phrase "court of competent jurisdiction" found in **25 U.S.C. §1914** grants Federal courts the right or opportunity to sit in "appellate" status of state court determinations. If Congress had chosen to provide that federal review procedure, it would have explicitly stated as much because federal courts, as courts of limited jurisdiction, cannot presume such a review exists.

The path the Tenth Circuit followed to this result was based upon its prior precedent in *Kiowa Tribe of Oklahoma v. Lewis*, 777 F.2d 587 (10th Cir., 1985) *cert. den.* 479 U.S. 872, 93 L.Ed.2d 171, 107 S.Ct. 247 (1986) At that time, this Court chose not to accept *Kiowa Tribe* on certiorari. In the past ten years since *Kiowa Tribe* was decided, Congress has not seen fit to modify the statute upon which the holding is based. Nor does the Tribe cite any cogent argument that even persuasively suggests the question they raise is any more susceptible to consideration now that it was over ten years ago.

Kiowa Tribe raises a similar question to the instant case. As the Tenth Circuit points out:

> . . . the Tribe moved to intervene in a Kansas state district court proceeding where a non-Indian couple petitioned for adoption of a child enrolled as a member of the Tribe. After considering briefs filed by the Tribe and the couple, the state district court held that the ICWA did not apply

and denied the Tribe's motion to intervene on that basis. The Tribe appealed the denial of its motion to intervene to the Kansas Supreme Court, where the court considered briefs and entertained oral argument by counsel for the Tribe and other interested parties. The Kansas Supreme Court affirmed the state district court's judgment that the ICWA was inapplicable.

Comanche Tribe v. Hovis, (10th Cir.) (*Petition*, **Append**. p. A-15)

The Kiowas did not proceed to this Court, which has jurisdiction by virtue of federal statute. *See* **28 U.S.C. §1257** Indeed, this was the successful path that the Mississippi Choctaw Indians took in *Mississippi Choctaw v. Holyfield*,[13] 490 U.S. 30, 104 L.Ed.2d 29, 109 S.Ct. 1597 (1989)

The Comanche Tribe did not test the waters of appellate jurisdiction in the Oklahoma Supreme Court. It chose, instead, to turn to the Federal courts and now argues, belatedly, that the Federal courts are entitled to such review under **§1914**. The Tribe should just say no.

The starting point in construing a statute is the language of the statute itself. *E.g.*, *Santa Fe Industries, Inc. v. Green*, 430 U.S. 462, 477, 97 S.Ct. 1292, 1303, 51 L.Ed.2d 480 (1977).

§1914 of the **ICWA** provides:

Any Indian child who is the subject of any action for foster care placement or termination of parental rights under

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[13]Because *Mississippi Choctaw* was an appeal from a state supreme court decision, contrary to any assertion of the Tribe, it does not instruct regarding any theory that allows the Federal district court to "referee" jurisdictional disputes between state and tribal courts.

> State law, any parent or Indian custodian from whose custody such child was removed, and the Indian child's tribe may petition any court of competent jurisdiction to invalidate such action upon a showing that such action violated any provision of section **1911**, **1912**, and **1913** of this title.

Nothing about this section suggests that Congress intended to repeal or displace the normal rules of "full faith and credit" required by **28 U.S.C. §1738**. Yet, it is consistent to suggest there are courts of competent jurisdiction that can review the State court's decision and those are found in the normal appellate procedures of the State and, eventually, this Court.

§1738 requires federal courts to give the same preclusive effect to state court judgments that those judgments would be given in the courts of the State from which the judgments emerged:

> . . . the federal courts consistently have applied res judicata and collateral estoppel to causes of action and issues decided by state courts. *Allen v. McCurry*, 449 U.S. 90, 96, 101 S.Ct. 411, 416, 66 L.Ed.2d 308 (1980); *Montana v. United States*, 440 U.S. 147, 99 S.Ct. 970, 59 L.Ed.2d 210 (1979); *Angel v. Bullington*, 330 U.S. 183, 67 S.Ct. 657, 91 L.Ed. 832 (1947). Indeed, from *Cromwell v. County of Sac*, 94 U.S. 351, 24 L.Ed. 195 (1877), to *Federated Department Stores, Inc. v. Moitie*, 452 U.S. 394, 101 S.Ct. 2424, 69 L.Ed.2d 103 (1981), this Court has consistently emphasized the importance of the related doctrines of res judicata and collateral estoppel in fulfilling the purpose for which civil courts had been established, the conclusive resolution of disputes within their jurisdiction. Under res judicata, a final judgment on the merits of an action precludes the

parties or their privies from relitigating issues that were or could have been raised in that action. *Allen v. McCurry*, *supra*., at 94, 101 S.Ct., at 414; *Cromwell v. County of Sac*, *supra*., at 352. Under collateral estoppel, once a court decides an issue of fact or law necessary to its judgment, that decision precludes relitigation of the same issue on a different cause of action between the same parties. *Montana v. United States*, *supra*., at 153, 99 S.Ct., at 973. *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 326, n. 5, 99 S.Ct. 645, 649, n. 5, 58 L.Ed.2d 552 (1979). Thus, invocation of res judicata and collateral estoppel "relieve[s] parties of the cost and vexation of multiple lawsuits, conserve[s] judicial resources, and, by preventing inconsistent decisions, encourage[s] reliance on adjudication." *Allen v. McCurry*, 449 U.S., at 94, 101 S.Ct., at 414. When a state court has adjudicated a claim or issue, these doctrines also serve to "promote the comity between state and federal courts that has been recognized as a bulwark of the federal system." *Id*., at 96, 101 S.Ct., at 416.

> *Kremer v. Chemical Const. Corp.*, 456 U.S. 461, 465 at Footnote 6, 102 S.Ct. 1883, 72 L.Ed.2d 262 (1982)

Kremer is perfectly illustrative of the correctness of the Tenth Circuit's decision. In *Kremer*, the Petitioner argued that Title VII formed a basis to relieve federal courts of the preclusive effect of **§1738** and that even if Title VII did not, the administrative and judicial procedures of New York were so deficient that they were not entitled to the preclusive effect of a final judgment. This Court rejected both of those suggestions:

Allen v. McCurry, 449 U.S. 90, 99, 101 S.Ct. 411, 417, 66 L.Ed.2d 308 (1980), made clear that an exception to **Sec. 1738** will not be recognized unless a later statute contains an express or implied partial repeal. There is no claim here that Title VII expressly repealed **Sec. 1738**; if there has been a partial repeal, it must be implied. "It is, of course, a cardinal principle of statutory construction that repeals by implication are not favored," *Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 154, 96 S.Ct. 1989, 1993, 48 L.Ed.2d 540 (1976); *United States v. United Continental Tuna Corp.*, 425 U.S. 164, 168, 96 S.Ct. 1319, 1322, 47 L.Ed.2d 653 (1976), and whenever possible, statutes should be read consistently. There are, however,

> " 'two well-settled categories of repeals by implication--(1) where provisions in the two acts are in irreconcilable conflict, the later act to the extent of the conflict constitutes an implied repeal of the earlier one; and (2) if the later act covers the whole subject of the earlier one and is clearly intended as a substitute, it will operate similarly as a repeal of the earlier act. But, in either case, the intention of the legislature to repeal must be clear and manifest. ...' " *Radzanower v. Touche Ross & Co. supra.*, at 154, 96 S.Ct., at 1993, quoting *Posadas v. National City Bank*, 296 U.S. 497, 503, 56 S.Ct. 349, 352, 80 L.Ed. 351 (1936).

Kremer, 456 U.S. at 468.

Title VII did not fit either of these exceptions of repeal by implication even though federal courts were entrusted with ultimate enforcement responsibility.[14]

Title VII also did not require claimants to pursue state court proceedings nor did it spell out the weight that federal courts were to give to those state determinations. Even though EEOC was, by statute, required to give "substantial weight" to those determinations, this was ". . . only the minimum level of deference the EEOC must afford all state determinations." See *Kremer*, 456 U.S. at 470. It did not suggest a de novo review.

The application of such a "dual standard of review" in the instant case would give rise to the same anomaly presented in *Kremer*:

> To suggest otherwise, to say that either the opportunity to bring a "civil action" or the "substantial weight" requirement implicitly repeals **Sec. 1738**, is to prove far too much. For if that is so, even a full trial on the merits in state court would not bar a trial de novo in federal court and would not be entitled to more than "substantial weight" before the EEOC. The state courts would be placed on a one-way street; the finality of their decisions would depend on which side prevailed in a given case.
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> *Kremer*, 456 U.S. at 470.

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[14]Of course, in the instant case, **§1911(b)** makes it clear that State courts have concurrent jurisdiction, thereby strengthening the argument their decisions have preclusive effect since State court involvement was clearly part of the overall scheme envisioned by Congress.

Just as there is no explicit language of a repeal of the effect of **§1738**, there is also nothing about **§1914** that suggests an implied partial repeal.

Even if there is an arguable claim of ambiguity that suggests we look to the legislative history, there is nothing about that history that mitigates in favor of an explicit or implied repeal.[15] **§1914** began as **§104** of **Public Law 95-608**. The sum total of the legislative comments of **House Report 95-1386** regarding **§104** (**§1914**) are as follows:

> Section 104 authorizes the child, parent, or Indian custodian, or the tribe to move to set aside any foster care placement or termination of parental rights on the grounds that the rights secured under section 101, 102, or 103 were violated.
>
> **95 U.S. Congressional and Administrative News** at 7546

This is hardly a ringing endorsement of precedent for uprooting of the finality of state court decisionmaking.

In short, the Tenth Circuit's decision is appropriate in its application of **§1738** and **§1914** is not authority for its partial repeal.[16]

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[15]The legislative history consists of the following reports: **Senate Report** (Indian Affairs Committee), No. 95-597, November 3, 1977 [To accompany S. 1214] and **House Report** (Interior and Insular Affairs Committee) No. 95-1386, (July 24, 1978 [To accompany H.R. 12533]. Cong. Record Vol. 123 (1977) and Cong. Record Vol. 124 (1978). See Public Law 95-608, **1978 U. S. Code Congressional and Administrative and Congressional News**, p. 7530.

[16] Federal courts, however, can exercise jurisdiction under the ICWA

(continued...)

II. THE TENTH CIRCUIT DID NOT VIOLATE THE AMERICAN RULE BY AN AWARD OF FEES WHERE THE ORIGINAL COMPLAINT FILED BY THE TRIBE INVOKED PENDENT JURISDICTION UNDER THE OKLAHOMA AND KANSAS UNIFORM CHILD CUSTODY JURISDICTION ACTS, PROVISIONS OF WHICH PROVIDE FOR ATTORNEYS FEES IN "APPROPRIATE" CASES, AND THE FEDERAL PARENTAL KIDNAPPING PREVENTION ACT, AN UNCODIFIED RELATED SECTION OF WHICH ENCOURAGES AWARDS OF FEES IN "APPROPRIATE" CASES.

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[16](...continued)
in appropriate circumstances. See *Roman-Nose v. New Mexico Dept. of Human Services*, 967 F.2d 435, 437 (10th Cir., 1992)(State court adoption decree could not be collaterally attacked by habeas corpus, but district court had jurisdiction under **§1914** over mother's pro se complaint challenging termination of parental rights as violation of ICWA); *Native Village of Venetie I.R.A. Council v. State of Alaska*, 944 F.2d 548, 552 (9th Cir., 1991)(District court had **28 U.S.C. §1331** jurisdiction under ICWA to force State of Alaska to give full faith and credit to adoption decrees entered by governing body of federally recognized native villages) However, there can be other reasons which counsel that the federal court withhold consideration of the jurisdictional issues brought before it. See *Schlesinger v. Councilman*, 420 U.S. 738, 754-5, 95 S.Ct. 1300, 420 U.S. 738 (1975)(Action by a Federal district court to enjoin **prejudgment court martial proceedings** was within general federal question jurisdiction of the district court, but that other prudent considerations regarding the exercise of equitable jurisdiction dictated that the federal court withhold action).

The holdings of these cases are not inconsistent with the Tenth Circuit's decision in the instant case because they do not permit relitigation of existing state court determinations.

After conclusion of the proceedings in the Circuit, Rhonda moved for an award of attorneys fees and costs in the appellate court. While the Tribe claims the Tenth Circuit's fee award was in violation of the "American Rule," it is simply not true that no statutory basis existed for the fee award.[17] The Tribe itself set the stage for a fee award by invoking state statutes that provided for fee awards in **Count Two** of its *Complaint*.

If the Tribe wanted an explanation for the Circuit's award of fees, it need look no further than the *Application for Fees, Costs and Expenses* filed by Intervenor Wahnee in the Tenth Circuit. The following brief synopsis of that argument supports the Tenth Circuit's decision.

The Comanche Tribe invoked federal jurisdiction pursuant to **28 U.S.C. §1331** (federal question) and **28 U.S.C. §1362** (Indian tribe federal question) and asserted claims under **25 U.S.C. §1901** and **1911(d)**. (*Petition*, **Append.**, p. F-2)

The Tribe made claims under two counts. The **First Count** alleged a cause of action under the **Indian Child Welfare Act, 25 U.S.C. §1911** *et seq.* and sought declaratory and injunctive relief against Defendant Hovis and the District Court. (*Petition*, **Append.** p. F-2, F-8-9)

The **Second Count** sought declaratory judgment and injunctive relief under alternative theories of action based upon the following federal and state statutes:

1. *Oklahoma Uniform Child Custody Jurisdiction*, **10 Okla. Stat. §1601-28** (Oklahoma UCCJA);[18]

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[17]Of course, under **Fed. Rul. Civ. Proc. 54**, costs could be awarded as a matter of course, regardless of the existence of other statutory authority.

[18]The *Oklahoma Child Custody Jurisdiction Act* was renumbered to **43 Okla. Stat. §501**, *et seq.* effective September, 1990, over two years prior to the filing date of the Tribe's original *Complaint* on October 28, 1992.

2. *Kansas Child Custody Jurisdiction Act*, **Kan. Stat. Ann. §38-1301** to **§38-1326** (Kan. UCCJA).[19]

3. *Parental Kidnapping Prevention Act*, **28 U.S.C. §1738A** (PKPA);

By pleading each of these claims, the Comanche Tribe submitted itself to federal jurisdiction to the extent of the claimed causes of action they asserted. Each of the state statutory provisions alleged as pendent claims contains a provision for attorneys fees in "appropriate" cases. Rhonda contended that this was just such an appropriate case.

Why? There is no simply no issue relevant to a claim under these three statutory provisions that carries any significant question involving the *Indian Child Welfare Act*. Instead, Rhonda contends that the Tribe included these issues as the alter ego of Blanche Wahnee, paternal aunt of Kristy, who was awarded temporary custody of the child by both the State District Court and the Tribal Court.[20]

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[19]Plaintiff did not cite the following additional provisions included under the Kansas version of the Uniform Statues: **Kan. Stat. Ann. §38-1326. Short Title; Kan. Stat. Ann. §38-1335. Continuation of jurisdiction until assumed by other state**. **Kan. Stat. Ann. §38-1327** to **§38-1334** are reserved under the Kansas statutory scheme.

[20]Before any altruistic motives of the Tribe seeking a "just" determination of jurisdiction are firmly cemented in place, one must ask: What possible relationship can there be of the alternative request for transfer to a Kansas court to the claimed singular interest of settling a question of jurisdiction under the ICWA? What significant issue of Native American Law or folklore would be preserved by transferring this case to Kansas except, perhaps, an effort to raise the ante to Rhonda so as to add an additional obstacle to Rhonda in getting her child back.

(continued...)

The Tribe now claims Count Two did not assert "pendent state claims." Instead, they say, **28 U.S.C. §1738A** was the true basis of their claim and references to state child custody jurisdiction statutes were "definitional" in nature and not merely assertive of a claim under state law. (*Petition*, p. 17-18)

If words are to have their ordinary meaning, it is disingenuous to argue that Count Two does not means what it, in fact, says. Nor is it reasonable to assert that **§1738A** preempts state law when, in fact, it is virtually identical, if not in wording, then in effect, to the state statutes the Tribe claims are "preempted." (See **Appendix H**)

Why would the Tribe even "define" the **Kansas UCCJA** or ask for a transfer of jurisdiction to Kansas if it was not asserting a claim on Blanche's behalf, who resided in Lawrence, Kansas during the school year. The Kansas Act would not otherwise be applicable to a controversy arising between the Oklahoma district court and the tribal court unless there was consideration of a separate claim on Blanche's behalf.

While it may be true that **28 U.S.C. §1738A** preempts state law to the extent that these state laws are contrary to its provisions, which they do not appear to be in relevant part, **§1738A** does not have an independent basis for federal jurisdiction. In *Thompson v. Thompson*, 484 U.S.174, 98 L.Ed.2d 512, 108 S.Ct. 513 (1988), this Court held **§1738A** does not create an implied cause of action in federal court to determine which of two conflicting state custody decisions is valid. Although the PKPA was intended to eliminate custody

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[21](...continued)

Blanche would not have been able to have brought such litigation in any court without subjecting herself to a possible award of fees under these same state statutes. Likewise, the Tribe should not be able to attempt the same result without exposure to those same fees.

struggles, this Court held that federal courts are not appropriate forums to raise a PKPA claim.[21] Thus, the Tribe could not assert a claim under **§1738A**. This leaves only the Oklahoma and Kansas UCCJA's as pendent state claims. And, of course, the ICWA does not support a transfer to Kansas for any reason.

Even if, as the Tribe claims, **§1738A** is an alternative basis for jurisdiction, it still provides an imperative for an award of fees as this reference to an uncodified section of **Public Law 96-611** makes clear:

> **Section 8(c)** of **Pub.L. 96-611** provided that: "In furtherance of the purposes of **§1738A** of title **28**, United States Code [this section], as added by subsection (a) of this section, State courts are encouraged to--
>
> (1) afford priority to proceedings for custody determinations; and
>
> (2) award to the person entitled to custody or visitation pursuant to a custody determination which is consistent with the provisions of such **§1738A** [this section], *necessary travel expenses, attorneys' fees, costs of private investigations, witness fees or expenses, and other expenses incurred in connection with such custody determination in any case in which--*
>
> (A) a contestant has, without the consent of the person entitled to custody or visitation pursuant to a custody determination which is consistent with the provisions of such **§1738A** [this

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[21]Nor is it reasonable to conclude **§1738A** supports a claim for pendent jurisdiction because this Court rejected federal courts as a forums under the "domestic relations" exception to federal jurisdiction.

> section], (i) wrongfully removed the child from the physical custody of such person, or (ii) wrongfully retained the child after a visit or other temporary relinquishment of physical custody; or
>
> (B) **the court determines it is appropriate**. (Emphasis added)

Thus, if there is any policy which Congress intended **§1738A** to represent, it would be the encouragement of awards of attorneys fees to parties dragged into inappropriate jurisdictions to litigate jurisdictional requirements long since settled or for which a prior opportunity to litigate was reasonably available and refused.

III. CASE LAW SUPPORTS A FEE AWARD AND RHONDA WAS ENTITLED TO FEES SINCE THE DECISION OF THE TENTH CIRCUIT MET THE TEST OF SUBSTANTIALITY ON A COMMON CORE OF FACTS EVEN THOUGH THE COURT NEVER RULED ON THE MERITS OF COUNT TWO.

The Tenth Circuit's award of fees and costs was consistent with its own decisions and this Court's allowances of fee awards under parallel circumstances. For example, a party who states a substantial federal constitutional claim, but obtains relief instead on an alternative theory of a pendent state claim is nevertheless entitled to attorneys fees. *Plott v. Griffiths*, 938 F.2d 164, 167-8 (10th Cir., 1991)

The basis is that the federal court has jurisdiction to decide the pendent state claim and may probably do so in order to avoid deciding a federal constitutional questions:

A federal court may exercise pendent jurisdiction over a state law claim when the federal claim is of sufficient substance to support federal jurisdiction. *See United Mine Workers of Am. v. Gibbs*, 383 U.S. 715, 725, 86 S.Ct. 1130, 1138, 16 L.Ed.2d 218 (1966). A federal claim is insubstantial only if it is "obviously without merit or is wholly frivolous," or "is clearly foreclosed by prior decisions of the Supreme Court." 13B *C. Wright, A. Miller & E. Cooper*, **Federal Practice & Procedure** Sec. 3564, at 68-70 (2d ed., 1984); see also *Hagans v. Lavine*, 415 U.S. 528, 536-39, 94 S.Ct. 1372, 1378-80, 39 L.Ed.2d 577 (1974); *Martinez v. United States Olympic Comm.*, 802 F.2d 1275, 1280 (10th Cir., 1986). When a substantial federal question regarding the constitutionality of a state statute is alleged, therefore, the district court has jurisdiction to decide all state questions in the case, even if the court decides the case on the basis of state law only. *Louisville & N. R.R. v. Garrett*, 231 U.S. 298, 303, 34 S.Ct. 48, 50, 58 L.Ed. 229 (1913); *Siler v. Louisville & N. R.R.*, 213 U.S. 175, 191, 29 S.Ct. 451, 454, 53 L.Ed. 753 (1909). Where a case "can be decided without reference to questions arising under the Federal Constitution, that course is usually pursued and is not departed from without important reasons." *Siler*, 213 U.S. at 193, 29 S.Ct. at 455; accord *Hawaii Hous. Auth. v. Midkiff*, 467 U.S. 229, 236, 104 S.Ct. 2321, 2327, 81 L.Ed.2d 186 (1984)("unsettled questions of state law must be resolved before a substantial federal constitutional question can be decided"); *Hagans*, 415 U.S. at 546, 94 S.Ct. at 1383-84 (courts deal first with possibly dispositive state law claims pendent to federal constitutional claims); *City of Cincinnati v. Vester*, 281 U.S. 439, 448-49, 50 S.Ct. 360, 363, 74 L.Ed. 950 (1930)(court will not decide important constitutional questions unnecessarily or hypothetically).

- - - - -

In *Maher v. Gagne*, 448 U.S. 122, 100 S.Ct. 2570, 65 L.Ed.2d 653 (1980), the Supreme Court noted that a plaintiff who prevails on a claim not covered by [**42 U.S.C.** §] section **1988** may nevertheless receive an award of attorney's fees under that section in the following circumstances:

> "In some instances, ... the claim with fees may involve a constitutional question which the courts are reluctant to resolve if the non-constitutional claim is dispositive. *Hagans v. Lavine*, 415 U.S. 528 [94 S.Ct. 1372, 39 L.Ed.2d 577] (1974). In such cases, if the claim for which fees may be awarded meets the 'substantiality' test, see *Hagans v. Lavine*, *supra*; *United Mine Workers v. Gibbs*, 383 U.S. 715 [86 S.Ct. 1130, 16 L.Ed.2d 218] (1966), attorney's fees may be allowed even though the court declines to enter judgment for the plaintiff on that claim, so long as the plaintiff prevails on the non-fee claim arising out of a 'common nucleus of operative fact.' *United Mine Workers v. Gibbs*, *supra*., at 725 [86 S.Ct. at 1138]."
>
> *Id.* at 133 n. 15, 100 S.Ct. at 2576 n. 15.

Federal appellate courts confronted with analogous cases involving constitutional and state law claims have held that, under *Maher*, when a plaintiff raises both a substantial constitutional claim and a pendent state law claim which is closely factually related, and the plaintiff prevails on the state claim, he is entitled to an award of attorney's fees under section **1988** even though the district court does not address the constitutional claim. *See Seaway Drive-In, Inc.*

> *v. Township of Clay*, 791 F.2d 447 (6th Cir.), *cert. den.*, 479 U.S. 884, 107 S.Ct. 274, 93 L.Ed.2d 251 (1986); *McDonald v. Doe*, 748 F.2d 1055, 1056-57 (5th Cir., 1984); *See also Wisconsin Hosp. Ass'n v. Reivitz*, 820 F.2d 863, 869 (7th Cir., 1987). For attorney's fees to be awarded, the constitutional claim must be substantial and both the statutory and constitutional claims must arise out of a common nucleus of operative facts. *Maher*, 448 U.S. at 133 n. 15, 100 S.Ct. at 2576 n. 15; *Seaway Drive-In*, 791 F.2d at 451-52. This test of substantiality is identical to the one described above that the district court must apply to determine whether it has pendent jurisdiction over a state law claim. **See** *Seaway Drive-In*, 791 F.2d at 452. If a constitutional claim is substantial for jurisdictional purposes, therefore, it will also be substantial for attorney's fees purposes. *See id.*
>
> *Plott v. Griffiths*, 938 F.2d 164, 167-8 (10th Cir., 1991)

Although not a perfect fit, this case is still clearly analogous to the instant case and this Court's holdings. Respondent Wahnee meets the test of "substantiality" under a common core of facts. Substantial questions were alleged as state statutory pendent claims, claims which, because of their parallel to the Panel decision would have had virtually identical results in Rhonda's favor had the merits been reached under the pendent state claims.[22]

---

[22]While it is true that neither the Federal district court nor the Tenth Circuit adjudicated Count Two on the merits, the record clearly reflects, contrary to the Tribe's assertions, the district court considered Count Two a separate claim as this excerpt from the docket shows:

(continued...)

The Tribe now claims the case of *F. D. Rich Co. Inc., v. Industrial Lumber Co.*, 417 U.S. 116, 94 S.Ct. 2157, 40 L.Ed.2d 703 (1974) supports the proposition that a prevailing party is not entitled to attorneys fee when they prevail on a federal claim even though state law would permit an award of attorneys fees in analogous circumstances.

Rich is distinguishable on nontrivial grounds from the instant case in several significant ways. **First**, the *Miller Act*, **40 U.S.C.A. §§270a** *et seq.* claim under *Rich* was **the only claim asserted in the district court** because it was an exclusive remedy under either federal or state law.[23] The *Miller Act* did not provide for an award of attorneys' fees to a successful plaintiff. *Rich v. Industrial Lumber*, 417 U.S. at 126.

Thus, there was no alternative basis for an award of fees. California law did not provide for awards of attorneys' fees in suits arising from private construction projects. The Ninth Circuit nonetheless held that since federal law controls *Miller Act* recoveries, it was free to look to "state policy" rather than state law and found an award of attorneys' fees appropriate. As a result, the Ninth Circuit gave the Respondent more protection than California law affords litigants involved in

---

[22](...continued)

7/21/93 26 COURTROOM MINUTES: re oral args on mtn to dism [6-1]; Cnsl apra as noted; court hears args on dft's mtn to dism; **court grants mtn to dism w/respect to the 2nd cause of action**; denies mtn to dism as to the central dispute; if plf's cnsl wishes, supplement to plf's MSJ may be filed w/in 2 weeks; dfts allowed 20 days to respond to MSJ now on file; if plf wishes to reply - must have leave of court (cc: all counsel) (bm) [Entry date 07/23/93](Emphasis added)

[23]As this Court noted, "The federal remedy was intended to substitute for the unavailable state remedy of the lien. . ." *Rich*, 94 S.Ct. at 2163-4.

disputes arising from private construction projects who are not entitled to an award of attorneys' fees. This Court's reversal was a simple application of the American Rule. *Rich v. Industrial Lumber*, 417 U.S. at 127-8.

In the instant case, **there is** a statutory basis for fees, thus *Rich* is no help to Petitioner.

CONCLUSION

The Comanche Tribe had ample opportunity to fully litigate the jurisdictional dispute over custody of Kristy in the State district court, but chose not to complete that process. While **§1914** allows the Tribe to bring a challenge in "a court of competent jurisdiction", that is not a general grant of appellate jurisdictional review by federal courts over state court proceedings that voids the normal requirements of "full faith and credit" of **28 U.S.C. §1738**.

The Tribe also cannot complain that an attorneys fee award was entered by the Tenth Circuit because it invoked state and federal statutes in its original *Complaint* that provided for fee awards in "appropriate" cases. An essential purpose of the *Oklahoma* and *Kansas Uniform Child Custody Jurisdiction Acts* as well as the federal *Parental Kidnapping Prevention Act* was a remedy for jurisdictional disputes over child custody issues which previously were not generally accorded "full faith and credit" from jurisdiction to jurisdiction. That is exactly what happened here. Intervenor Rhonda Wahnee successfully defended a jurisdictional challenge to the State district court proceedings using essentially the same criteria as would otherwise have been controlling under a determination made under the State Acts. In short, the award of fees to Rhonda

was an appropriate exercise by the Tenth Circuit to compensate Rhonda for the inappropriate renewed litigation by the Tribe.

Accordingly, Respondents respectfully request that this Court deny the Tribe's *Petition* to review the decision of the Tenth Circuit.

Respectfully submitted,

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APPENDIX A

(Excerpt of Original *Petition* for juvenile proceeding regarding Kristy Wahnee filed May 6, 1986 in the District Court of Kiowa County, State of Oklahoma)

In the District Court of Kiowa County, State of Oklahoma

In The Matter of:	)	
	)	
SHANNON WAHNEE	)	No. JFJ-86-12
KRISTY WAHNEE	)	
	)	
Alleged Deprived Children	)	
Under the Age of 18 Years.	)	

PETITION

IN THE NAME AND BY THE AUTHORITY OF THE STATE OF OKALHOMA (sp) AND PURSUANT TO 10 O.S. 1971 §1103(B), comes now Steven S. Suttle, the duly elected, qualified and acting District Attorney for KIOWA County, Oklahoma and gives the Court to know and be informed that Kristy Wahnee is a female child of the age of 3 years born on the 19 day of July, 1982, who was found in this county, whose father is Stuart Barr Wahnee, 906 S.W. 4th, Anadarko, Ok whose mother is Rhonda Greenough/Wahnee, Box 12, Mt. View, OK and the child now resides with Rhonda Greenough/Wahnee of Box 12, Mt. View, OK, County, Oklahoma and is now a deprived child within the meaning of 10 O.S. §1101 et seq. and has come within the purview of those statutes because:

That the child does not have the proper parental care or guardianship in that the mother allows her friend to abuse and mistreat the children

The State prays that the parental rights of Rhonda Greenough/Wahnee in said child be terminated.
That the Court order support payments in the amount of $__ _ per month be paid by _____ to the Department of Human Services through the Court Clerk of Kiowa County for the support and maintenance of said child while in the Department's custody,
That the child be made a ward of this Court and actual custody of this child be given to the Department of Human Services of the State of Oklahoma and other proper relief as the Court may deem necessary.

STEVEN S. SUTTLE, District Attorney

by s/John J. White
Assistant District Attorney

VERIFICATION

I, Stuart Barr Wahnee, do solemnly swear that I have read the above *Petition*, am aware of its contents and do verify that to the best of my information and belief the contents are true and correct.

s/Stuart Wahnee

Signed and sworn to before me this 5th day of May, 1986.
DEANNA BONNER, Court Clerk
s/Deanna Bonner
~~Deputy~~

APPENDIX B

(Journal Entry - Adjudication dated June 16, 1986 and filed in the District Court of Kiowa County, State of Oklahoma)

In the District Court of Kiowa County, State of Oklahoma

In The Matter of:	)	
	)	
SHANNON WAHNEE	)	No. JFJ-86-12
KRISTY WAHNEE	)	
	)	
Alleged Deprived Children	)	
Under the Age of 18 Years.	)	

JOURNAL ENTRY - ADJUDICATION

Now on the 16th day of June, 1986, this cause having been heard on the duly verified petition filed on the 5th day of May, 1986, John J. White, Assistant District Attorney appearing for the petitioner; Charles W. Barker Jr., Attorney, appearing for the children also appearing: the mother with her attorney Nellie Perry and the father and his attorney George TaBone. Whereupon, all parties were advised of their statutory and constitutional rights; and no demand having been made for jury trial, witnesses were sworn and testimony taken.

The Court, after reviewing the files, hearing sworn testimony and being fully advised in the premises, finds:

1) That the Court has jurisdiction of the subject matter and the parties hereto.

2) That the material allegations in the petition are true; that the Court makes the following findings of fact: That the children do not have the proper parental care and has been abused and mistreated while in the mother's care.

3) That the petition should be sustained by reason of testimony.

4) That the children should be made wards of the Court as deprived children.

5) That the Service plans provided by the Department of Human Services and filed herein are proper and must be followed by parents.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED BY THE COURT that the children are hereby made wards of the Court as deprived children.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED BY THE COURT that the temporary custody of the children should be and is placed with the Department of Human Services with authority to consent to any necessary medical treatment, including emergency surgery, which may be required by the children.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED BY THE COURT that the parents must comply with the Service Plans filed herein and these Service Plans are hereby made a part of this Order.

IT IS FURTHER ORDERED THAT this matter be set down for Disposition on the 15th day of October, 1986, at 10:00 A.M. Before the Honorable Lloyd R. Reeder.

s/Lloyd R. Reeder
Lloyd R. Reeder
Judge of the District Court

APPENDIX C

(Court Minute dated and filed May 27, 1987
in the Kiowa County District Court)

In The Matter of:	)	
	)	
SHANNON WAHNEE	)	No. JFJ-86-12
KRISTY WAHNEE	)	
	)	
Alleged deprived children	)	
Under the age of 18 years.	)	

MINUTES

May 27, 1987

Nellie Perry, Attorney for mother, objects to the transfer of this case by the Comanche tribe.

Entered cause comes on before Judge Lloyd R. Reeder for hearing. Lee Ann Davis is Court Reporter. Petitioner appears by John J. White, Assistant District Attorney. Mother is present and represented by Nellie Perry, Court Appointed Attorney. Children are not present but are represented by their Court Appointed Attorney, Charles W. Barker, Jr. Father is present and represented by his Court Appointed Attorney, George Tah-Bone. All parties announce ready for hearing. 2 witnesses sworn. The mother requests visitation; this will be worked out among parties. Court states that the District Attorney's office is to advise the Comanche tribe that they need to make a request to the Court for transfer of this case. Further testimony is taken. Mr. Tah-Bone presents the Journal Entry of Divorce to be made a part of the record. Case is postponed to July 27, 1987 at 10:00 a.m.

APPENDIX D

(Motion to Transfer filed in the District Court of Kiowa County by Comanche Tribe)

DISTRICT COURT IN AND FOR
KIOWA COUNTY
IN THE STATE OF OKLAHOMA

IN THE INTEREST OF:

Shannon James Wahnee	)	No. JFJ-86-12
dob: 04-19-85	)	
Kristy Wahnee	)	
dob: 07-19-82	)	
Comanche minors	)	**MOTION TO TRANSFER**

COMES NOW, this 9 day of June, 1987, the Comanche Tribal Children's Court of the Comanche Indian Tribe, Lawton, Oklahoma, moves the District Court in and for Kiowa County, State of Oklahoma, to transfer the above-styled matter of Shannon James Wahnee and Kristy Wahnee, JFJ-86-12, for the following reasons:

01 That the children are enrolled members of the Comanche Tribe, and,

02 That pursuant to the Indian Child Welfare Act, 25 USC 1911(b) and the Comanche Indian Child Welfare Code, 1-1-5(1), any state court shall transfer to the Comanche Tribal Children's Court any proceeding for the foster care placement of, or termination of parental rights to, any Indian child who is a member of or

eligible for membership in the Comanche Tribe if the Children's Court finds that the transfer would not be detrimental to the best interests of the child, and,

03 That the Comanche Indian Tribe, by the adoption of the Comanche Indian Child Welfare Code, which was approved by the Bureau of Indian Affairs on November 29, 1982, has the proper jurisdiction to request for transfer.

WHEREFORE, movant prays that an Order for Transfer by(sp) issued in the above-styled matter and further, that all court and social records pertaining to the above-styled matter be transferred to the Comanche Tribal Children's Court.

s/Eunice Tosee
Judge, Comanche Tribal Children's Court

APPENDIX E

(Order to Transfer filed in the District Court of Kiowa County on June 11, 1987)

In the District Court of the Third Judicial District of the State of Oklahoma, Sitting within and for Kiowa County

In The Matter of:	)	
	)	
SHANNON WAHNEE	)	
d/o/b 4-19-84	)	
	)	No. JFJ-86-12
KRISTY WAHNEE	)	
d/o/b 7-19-82	)	
	)	
Alleged Deprived Children	)	
Under the Age of 18 Years.	)	

ORDER TO TRANSFER

Now on this the 11th day of June, 1987, the Motion to Transfer the above styled and numbered cause to the Comanche Tribal Children's Court, comes on for hearing.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED, that the above styled and numbered cause is hereby ordered Transferred to:

Comanche Tribal Children's Court
P. O. Box 908
Lawton, Oklahoma 73502

The Court Clerk of Kiowa County is hereby ordered and directed to transmit forthwith all files, pleadings, instruments and a certified copy of the docket sheets herein to Comanche Tribal Children's Court, Lawton, Oklahoma 73502, provided, however, the original of this Transfer Order shall be maintained in the file of the Clerk of this Court and a Certified copy of such Transfer Order shall accompany the transmittal of the cause as above provided.

DONE on this 11th day of June, 1987.

s/Lloyd R. Reeder

Lloyd R. Reeder
Judge of the District Court

APPENDIX F

(Excerpt of Order of Supreme Court of the State of Oklahoma filed September 24, 1991)

In The Supreme Court of the State of Oklahoma

Tuesday, September 24, 1991

The Clerk is directed to issue the following orders:

* * * * *

77,861 Blanche Wahnee v. Honorable Richard E. Hovis, Judge of the District Court of Kiowa County, State of Oklahoma and Rhonda Wahnee.
Application to assume original jurisdiction denied.
CONCUR: Hodges, V.C.J., Lavender, Simms, Hargrave, Summers, JJ.
DISSENT: Doolin, Kauger, JJ.

Opala, C.J. dissenting, I would treat this case as a timely appeal from the trial court's vacation of transfer order.

* * * * *

(Other orders involving unrelated cases)

APPENDIX G

(Administrative Order of Comanche Tribal Children's Court dated October 6, 1990 and filed October 15, 1990[1])

In the Comanche Tribal Children's Court of
The Comanche Tribe of Oklahoma

In The Interest of:	)	
	)	
KRISTY ANN WAHNEE	)	No. JV-86-9
DOB 07-19-82	)	
	)	
(A) Comanche child(~~ren~~) and	)	
concerning respondent(s):	)	
Stuart Barr Wahnee and	)	**ORDER**
Rhonda Greenough McAdams	)	
Wahnee	)	

Comes now the Comanche Tribal Children's Court on its own motion and issues this administrative order.

After due consideration of the issues and based upon the Court's findings that:

1.0 The Court is without necessary personnel; and,

2.0 Pending such time that operational needs of the Court are met;

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED:

---

[1]The concurrence of the Tribal Chairman was dated October 25, 1990, ten days after the Order was shown filed in the Tribal Children's Court.

1.0 That pursuant to Comanche Indian Child Welfare Code, Article 1, §1-3-13, the Court hereby continues all court cases until further order of the Court;

2.0 All orders previously issued in these cases shall remain in effect until further action of the Court;

3.0 In the event of an emergency, any party may petition for a show-cause hearing to be able to show cause that immediate Court hearing is necessary to protect individual rights under the Comanche Indian Child Welfare Code; and,

4.0 Because of the budgetary constraints and resultant cutbacks in court judicial activity, code mandated time limitations are stayed pending a resumption of full Tribal Court activity.

DATE: October 6, 1990

s/Weckeah Bradley
Judge, Comanche Tribal Children's Court

s/Baldwin Parker, Jr.
Judge, Comanche Tribal Children's Court

s/Eunice Tosee
Judge, Comanche Tribal Children's Court

Comanche Tribal Children's Court
HC 32, Box 1720
Lawton, Oklahoma 73501
AC 405/492-4988 X70

CONCUR s/unreadable DATE: 10-25-90
Chairman
Comanche Nation

APPENDIX H

28 U.S.C. §1738A. Full faith and credit given to child custody determinations

(a) The appropriate authorities of every State shall enforce according to its terms, and shall not modify except as provided in subsection (f) of this section, any child custody determination made consistently with the provisions of this section by a court of another State.

(b) As used in this section, the term--

(1) "child" means a person under the age of eighteen;

(2) "contestant" means a person, including a parent, who claims a right to custody or visitation of a child;

(3) "custody determination" means a judgment, decree, or other order of a court providing for the custody or visitation of a child, and includes permanent and temporary orders, and initial orders and modifications;

(4) "home State" means the State in which, immediately preceding the time involved, the child lived with his parents, a parent, or a person acting as parent, for at least six consecutive months, and in the case of a child less than six months old, the State in which the child lived from birth with any of such persons. Periods of temporary absence of any of such persons are counted as part of the six-month or other period;

(5) "modification" and "modify" refer to a custody determination which modifies, replaces, supersedes, or otherwise is made subsequent to, a prior custody determination concerning the same child, whether made by the same court or not;

(6) "person acting as a parent" means a person, other than a parent, who has physical custody of a child and who has either been awarded custody by a court or claims a right to custody;

(7) "physical custody" means actual possession and control of a child; and

(8) "State" means a State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, or a territory or possession of the United States.

(c) A child custody determination made by a court of a State is consistent with the provisions of this section only if--

(1) such court has jurisdiction under the law of such State; and

(2) one of the following conditions is met:

(A) such State (i) is the home State of the child on the date of the commencement of the proceeding, or (ii) had been the child's home State within six months before the date of the commencement of the proceeding and the child is absent from such State because of his removal or retention by a contestant or for other reasons, and a contestant continues to live in such State;

(B) (i) it appears that no other State would have jurisdiction under subparagraph (A), and (ii) it is in the best interest of the child that a court of such State assume jurisdiction because (I) the child and his parents, or the child and at least one contestant, have a significant connection with such State other than mere physical presence in such State, and (II) there is available in such State substantial evidence concerning the child's present or future care, protection, training, and personal relationships;

(C) the child is physically present in such State and (i) the child has been abandoned, or (ii) it is necessary in an emergency to protect the child because he has been subjected to or threatened with mistreatment or abuse;

(D) (i) it appears that no other State would have jurisdiction under subparagraph (A), (B), (C), or (E), or another State has declined to exercise jurisdiction on the ground that the State whose jurisdiction is in issue is the more appropriate forum to determine the custody of the child, and (ii) it is in the best interest of the child that such court assume jurisdiction; or

(E) the court has continuing jurisdiction pursuant to subsection (d) of this section.

(d) The jurisdiction of a court of a State which has made a child custody determination consistently with the provisions of this section continues as long as the requirement of subsection (c)(1) of this section continues to be met and such State remains the residence of the child or of any contestant.

(e) Before a child custody determination is made, reasonable notice and opportunity to be heard shall be given to the contestants, any parent whose parental rights have not been previously terminated and any person who has physical custody of a child.

(f) A court of a State may modify a determination of the custody of the same child made by a court of another State, if--

(1) it has jurisdiction to make such a child custody determination; and

(2) the court of the other State no longer has jurisdiction, or it has declined to exercise such jurisdiction to modify such determination.

(g) A court of a State shall not exercise jurisdiction in any proceeding for a custody determination commenced during the pendency of a proceeding in a court of another State where such court of that other State is exercising jurisdiction consistently with the provisions of this section to make a custody determination.